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NEGLIGENCE AND COMPENSATION CASES ANNOTATED

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THE WORKMEN'S COMPENSATION, EMPLOYERS' LIABILITY,
AND CURRENT NEGLIGENCE CASES DECIDED IN THE
FEDERAL COURTS OF THE UNITED STATES,
THE COURTS OF LAST RESORT OF ALL
THE STATES AND TERRITORIES
AND THE ENGLISH AND
CANADIAN COURTS.

WITH PLEADINGS AND FORMS.

By THE PUBLISHERS' EDITORIAL STAFF.

VOLUME I

Harv. L. J.
US
523

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1912

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PREFACE.

This series of reports is known as **NEGLIGENCE AND COMPENSATION CASES ANNOTATED**, and is cited as **N. C. C. A.** The series is the outgrowth of necessity. The rapidly increasing number of negligence cases and the importance of decisions under Workmen's Compensation Acts and Employers' Liability Statutes have created a demand on the part of the legal profession that such cases be segregated from the great mass of cases on other subjects, and that they be brought together in some convenient form. The profession has come to appreciate the usefulness of a special series of cases on a branch of the practice, in which nearly every lawyer is interested. Experience will, it is believed, fully demonstrate the convenience and value of this series.

It will be the aim of the publishers to put the greatest amount of material into the smallest practical compass, at the lowest price. The series will begin at the point where the **AMERICAN NEGLIGENCE REPORTS** leave off, and will contain all of the cases on the broad subject of Negligence, including cases of Personal Injuries and Injuries to Property, decided by the higher courts, State and Federal in America, including Alaska, Porto Rico and the Philippines, England and Canada; also all cases dealing with Employers' Liability Insurance Contracts, and cases arising under Employers' Liability Statutes, Employers' or Industrial Insurance Statutes, and Workmen's Compensation Acts.

Exhaustive annotation upon practical topics will be one of the leading features of this series, and no time or expense will be spared in making the monographic notes of the greatest helpfulness to the profession. In the annotation all of the cases in point will be analyzed, the facts in each case fully set out and the doctrine applicable clearly

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stated. The notes will not consist of mere statements of general rules, but will be comprehensive so that it will not be necessary for the reader to examine the cases cited. The date of each case cited in the annotation will be given; the value of the date is recognized by every lawyer who knows of the fluctuating and unstable condition of the law on the subjects of Employers' Liability, Industrial Insurance, and Workmen's Compensation. A conscientious effort will be made to prepare annotations which shall be of the greatest service to lawyers.

Another feature of the series which every practicing lawyer will appreciate, is the insertion of the pleadings involved in each case, so far as the same can be obtained. The material issues of each case may in this way be ascertained, and the pleadings may safely be used by lawyers as forms or precedents in similar cases.

Each volume will contain not less than 100 fully reported cases, with numerous notes of cases, Table of Reported Cases, Table of Cited Cases, Table of Cases Classified according to the facts, cumulative Index to Notes, Index to Pleadings, and General Index with many cross-references. About three volumes will be issued per year.

In issuing this series the publishers are prompted by a desire to save time, energy and expense for attorneys, and to decrease the now arduous labor required in searching for cases in point among the almost numberless decisions rendered by the higher courts. We hope the members of the legal profession will find this volume and the others which shall follow of real service and benefit to them in their work.

CALLAGHAN AND COMPANY.

Chicago, December, 1912.

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NEGLIGENCE AND COMPENSATION CASES ANNOTATED

VOL. I

ATLANTIC REFINING COMPANY v. LEFFINGWELL AND BERRY.

[SUPREME COURT OF FLORIDA, JANUARY 17, 1911]

61 Fla. 101.

Master and Servant—Power to Employ Physician.

Where a corporation operates a mining plant, and does not authorize its superintendents to employ a physician at the expense of the corporation to attend an employee injured by the machinery of the plant, the law does not imply such authority, at least, where there is testimony that such authority was not given or contemplated by those exercising the rights of the corporation. The liability of the corporation for negligence that proximately injures an employee may extend to medical services rendered to an injured employee, but this does not create a contract liability for such services.

[Headnote by the Court.]

Error to the Circuit Court of Manatee County, to review a judgment rendered in favor of plaintiffs in an action brought to recover compensation for medical attendance rendered defendant's injured employee. Reversed.

Implied Authority of Agent or Employee to Bind Employer for Medical Services Rendered Injured Person.

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For plaintiff in error—C. C. Whitaker.

For defendants in error—Singeltary & Reaves, and W. A. Carter.

DECLARATION.

John B. Leffingwell and Ned C. Berry, co-partners doing business under the firm name of Leffingwell and Berry, plaintiffs, by their at-

I. INJURED EMPLOYEES.

A. Of Railroad Companies.

1. No Special Emergencies.

(a) Authority of Claim Agent.

An employee who has charge of the claim department of a railroad company and who is in general charge of the doctors on the line to the extent of making appointments and giving general directions as to injured employees, was held in *Bigham v. Chicago, M. & St. P. R. Co.*, 79 Iowa, 534, 15 Am. Neg. Cas. 736n (1890), to have power to authorize a doctor to hire a nurse to attend an employee whose legs were crushed while in the performance of his duties as an employee of the railroad company.

(b) Authority of Physician of Company.

The fact that a physician in the service of a railroad company is authorized to buy medicines on the credit of the company, does not imply authority on his part to bind the company by a contract for board and nursing of a brakeman who received injuries on the company's road. *Mayberry v. Chicago, R. I. & P. R. Co.*, 75 Mo. 492, 15 Am. Neg. Cas. 741n (1882).

And a physician who is only occasionally employed by a railroad company to attend employees injured in the performance of their duties, has no implied power to bind the company by the employment of another physician to assist him in a case in which he had been specially employed by the company. *Evansville & I. R. Co. v. Spellbring*, 1 Ind. App. 167, 15 Am. Neg. Cas. 740n (1890).

A telegram sent by the chief surgeon

of a railroad company to a district surgeon of another district, directing him to give medical attendance to an employee of the company who had been injured, was held in *Smith v. Chicago & N. W. R. Co.*, 104 Iowa, 147 (1897), not to give the district surgeon any apparent authority to employ a local physician to assist him in the performance of an operation. And the chief surgeon of a railroad company has no implied authority to employ another to assist him in treating an injured employee of the company, where his express authority is limited to the employment of regularly appointed local surgeons of the company. *Burke v. Chicago & W. M. R. Co.*, 114 Mich. 685 (1897).

(c) Authority of Yard, Train, or Road Master.

A yard master of a railroad who is in charge of the yards of the company and who has power to employ men for the purpose of making up trains in the yards, has no authority, by virtue of his office alone, to bind the company by the employment of a surgeon to attend one of the men employed under him who has been accidentally injured in the course of his employment. *Marquette & O. R. Co. v. Taft*, 28 Mich. 289, 15 Am. Neg. Cas. 737n (1873).

A railroad company was held liable in *Chicago, P. & M. R. Co. v. Kane*, 65 Ill. App. 276 (1896), under a contract for nursing a person injured in its service, made by a train master who was apparently clothed with authority.

The authority of a road master of a railroad company to employ a physician and surgeon to aid an injured employee

torneys Singeltary & Reaves, sue the Atlantic Refining Co., a corporation, defendant, for money payable by the defendant to the plaintiffs for this, that heretofore, to-wit: On the 1st day of May, 1906, the said defendant was indebted to the plaintiffs for medical attendance, advice and medicines given and provided by the plaintiffs to and for one Thomas Urquhart, an employee of the defendant, at the special

of the company, was denied in *Peninsular R. Co. v. Gary*, 22 Fla. 356, 1 Am. St. Rep. 194 (1886). And, in *Houston & T. C. R. Co. v. Watkin*, 1 Tex. Civ. App. Cas. 147, it was held that a road master, whose duties were limited to the care of the track and seeing that the road was kept in safe condition, has no power to employ a physician to attend an injured employee of the company, where the general officers of the railroad company are alone empowered to employ physicians and communication with them at the time of the injury was easy.

In an action against a railroad company by a physician to recover for medical services rendered to an employee who was injured while in the service of the company, at the request of a supervisor of a portion of its line of railroad, it was held that a custom binding on the company to pay for professional services rendered at the request of the supervisor, was not established by proof that on a single prior occasion, the company had paid for services rendered by another physician to another employee who had been injured in the performance of his duties, at the request of another supervisor who had charge of a portion of the road. "To become a usage or custom of trade," said the court, "and thus to make such custom a part of the law of the case, it must be shown to have been so generally known, so well settled, as to raise the presumption that the parties contracted in reference to it." *Mobile & M. R. Co. v. Jay*, 61 Ala. 247 (1878).

(d) Authority of Conductor, Station Agent, etc.

Station agents and conductors of a

railroad are not authorized by virtue of their position to employ a physician, at the expense of the company, to attend a brakeman who was injured by its cars in the course of his employment. *Tucker v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 177, 15 Am. Neg. Cas. 741n (1873); *Peninsular R. Co. v. Gary*, 22 Fla. 356, 1 Am. St. Rep. 194 (1886); *St. Louis & K. C. R. Co. v. Olive*, 40 Ill. App. 82 (1891).

Neither a conductor, station agent, nor solicitor of a railroad company is authorized in ordinary cases to contract for surgical attendance upon an employee who is injured in operating the trains of the company, so as to bind the company. *St. Louis, A. & T. R. Co. v. Hoover*, 53 Ark. 377, 15 Am. Neg. Cas. 739n (1890). The court, however, qualified this ruling by saying that "it has been held that where such injury is done at a distant point from the chief office of the company, and there is urgent necessity for the employment of a surgeon to render professional services to an injured employee, the conductor, if he is the highest agent of the company on the ground, has authority to bind the corporation by the employment of a surgeon to render services required by the emergency."

The conductor of a freight train has no implied power to bind the railroad company for the services of a physician rendered a brakeman who was injured in the course of his employment. If, however, the general superintendent of the company should ratify the conductor's unauthorized employment of such physician, with full knowl-

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instance and request of the said defendant of the value of \$1,000; and in the further sum of \$1,000 for work and labor done by the plaintiffs for the defendant, at its request; and in a like sum for money found to be due the plaintiffs from the defendant on an account stated between them; and in a like sum for interest on divers sums of money forborne by the plaintiffs to the use of the defendant at and before

edge of the facts, the company would be liable for the services so rendered. *Sevier v. Birmingham, S. & T. R. Co.*, 92 Ala. 258, 15 Am. Neg. Cas. 739n (1890).

A railroad company was held liable in *Indianapolis & St. L. R. Co. v. Morris*, 67 Ill. 295 (1873), for medical attendance rendered by one to whose house a brakeman, who was injured in the course of his employment, was taken by the conductor who had charge of the train, where the officers of the company did not notify the plaintiff that they would not be liable, upon notice to them by telegraph of what the conductor had done.

It has been held in several cases that a conductor has temporary authority to employ a physician or surgeon to attend an injured passenger or employee of a railroad company, whenever he is the highest agent of the company present at the spot where the accident or injury occurs. *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 15 Am. Neg. Cas. 734n, 49 Am. Rep. 752 (1884); *Louisville, N. A. & C. R. Co. v. Smith*, 121 Ind. 353, 15 Am. Neg. Cas. 735n, 6 L. R. A. 320 (1889); *Toledo, St. L. & K. C. R. Co. v. Mylott*, 6 Ind. App. 438, 15 Am. Neg. Cas. 736n (1892); *Evansville & R. R. Co. v. Freeland*, 4 Ind. App. 207, 15 Am. Neg. Cas. 735n (1891).

But a mere station agent of a railroad company has no authority by virtue of his position as such agent to employ a hotel keeper to furnish board and attendance at the expense of the company to a brakeman who had been injured while in the discharge of his duties. *Atlantic & P. R. Co. v. Reis-*

ner, 18 Kan. 458, 15 Am. Neg. Cas. 736n (1877).

A railroad company will be held liable for the unauthorized act of its station agent in employing a surgeon to attend an employee who was injured in the service of the company, unless, upon due notice to the general superintendent, the act is not repudiated at once and the station agent directed to inform the surgeon of the company's disapproval of such employment. *Toledo, W. & W. R. Co. v. Prince*, 50 Ill. 26, 15 Am. Neg. Cas. 733n (1869). The court said: "Although a railroad company is under no legal obligation to provide medical attendance for persons injured in its service, yet this would be a reasonable thing to do, where the wounded employee is dependent upon his daily labor for support, that a jury will find, even upon somewhat slight evidence, that the act of a station agent in employing surgical skill necessary to save human life was ratified by his superiors. In this case, however, the station agent reported the case to the general superintendent a few days after the accident, and he testified that he heard no complaint in regard to his action until he afterward presented the bills for payment."

That a station agent of a railroad company has no presumptive power to employ a physician and surgeon to render aid to an employee of the company who was injured in the course of his employment, was also maintained in *Cooper v. New York C. & H. R. R. Co.*, 6 Hun (N. Y.), 276 (1875). In this case the engineer of a gravel train telegraphed to a station agent on defend-

the date aforesaid; and being so indebted, the defendant, in consideration of the premises, promised to pay to the plaintiffs the said several sums of money so due them as aforesaid, which the plaintiffs have often requested the defendant to so do, but the said defendant has disregarded its said promise and has failed, neglected and refused to pay the said several sums of money to the plaintiffs or any part

ant's line to "have Cooper (plaintiff) at the depot on arrival of No. 1; a man hurt." The station agent handed the telegram to a hackman, with directions to give it to plaintiff, which he did. No other communications were had between the plaintiff and the agent or engineer who sent the message; nor was it shown that either the agent or engineer had ever undertaken to employ plaintiff on behalf of the railroad company on any previous occasion. In an action against the railroad company to recover for services so rendered, the court held that the plaintiff was not entitled to recover, on the ground that no employment by the company was shown. On the trial of the action the plaintiff offered to show that he had previously attended persons injured by the defendant's railroad, and had been paid therefor by the company, but did not offer to show that, in such case, he had been employed by either the station agent or engineer. The evidence so offered was held to have been properly rejected, under the rule laid down in 2 Redfield on Railways, § 114, to the effect that evidence that the company had ratified similar contracts made by some particular agent might be evidence tending to show that the company had given him authority to make similar contracts, but was not competent to prove that it had given authority to all of its servants to do so.

In *St. Louis Merchants' Bridge T. R. Co. v. Wiggins*, 47 Ill. App. 474 (1893), it was held that a railroad company is not bound to pay for the services of a physician and surgeon in attending an injured employee at the instance of

another employee, whose duties and powers were not shown by the evidence.

(e) Authority of Superintendent and General Officers.

It will be presumed, in absence of anything to the contrary, said the court in *Pacific R. Co. v. Thomas*, 19 Kan. 256, 15 Am. Neg. Cas. 737n (1877), that the general superintendent of a railroad company has authority from the company to employ physicians and surgeons to attend an employee of the company who has been injured while in the performance of his duties as such employee; and it will also be presumed that a division superintendent has the same power within the bounds of his division; it will also be presumed that where an officer or agent of the company has power in the first instance to employ a physician or surgeon, that such officer or agent also had the power to ratify a previous unauthorized employment by some other person; these presumptions, however, may be rebutted by proof showing that no such authority existed.

The employment of a surgeon by a general officer of a railroad company to render services to employees who were injured in the performance of their duties in the company's service, is not *ultra vires*. The court said: "The business of railroad is recognized by every one as hazardous. Persons engaged in the business are liable to be injured, and often receive injuries which the highest degree of skill and care could not have prevented. If a railroad corporation sees proper to recognize this fact, and, prompted by the highest considerations of justice and

thereof, to the great damage of the plaintiffs, wherefore they bring this suit and claim as their damage, the sum of \$1,900.

PLEA.

Now comes the defendant in the above entitled cause, by its attorney, C. C. Whitaker, and defends the wrong and injury complained

humanity, enters into a contract with a physician to give prompt attention to any of its servants who may be injured, and such attention is given injured employees, a court will not say, in a suit for the value of such service, that the contract is one beyond the power of the corporation to make." Bedford Belt R. Co. v. McDonald, 17 Ind. App. 492, 15 Am. Neg. Cas. 736, 60 Am. St. Rep. 172 (1897).

The president, vice-president, general manager, secretary and treasurer, are general officers of a railroad company who have power to employ medical attendance for workmen who are injured in the performance of their duties in the service of the company. Bedford Belt R. Co. v. McDonald, *supra*.

Although the charter of a railroad company may not in express terms authorize the company to incur expenses on account of an injury received by an employee in course of his employment, yet it was held in Toledo, W. & W. R. Co. v. Rodrigues, 47 Ill. 188, 15 Am. Neg. Cas. 733n, 95 Am. Dec. 484 (1868), that the company may, in the exercise of its corporate powers, employ a nurse to take care of a brakeman who had been run over by a locomotive and injured.

The general superintendent of a railroad company has authority to employ a surgeon to attend a person who has been injured by one of the company's trains, whether the injured person be an employee or not. Bedford Belt R. Co. v. McDonald, 17 Ind. App. 492, 15 Am. Neg. Cas. 743, 60 Am. St. Rep. 172 (1897).

The general superintendent of a

railroad company has authority to employ one to render medical aid to an employee injured in the course of his employment. Toledo W. & W. R. Co. v. Rodrigues, 47 Ill. 188, 15 Am. Neg. Cas. 733n, 95 Am. Dec. 484 (1868); Louisville, E. & St. L. R. Co. v. McVay, 98 Ind. 391, 15 Am. Neg. Cas. 735, 49 Am. Rep. 770 (1884).

It was held to be error, in Union Pacific R. Co. v. Beatty, 35 Kan. 265, 15 Am. Neg. Cas. 737n, 10 Pac. 845, 57 Am. Rep. 160 (1886), to charge the jury that the division superintendent of a railroad company would be presumed to have authority to employ a doctor and to bind the company for medical care and protection given injured passengers, unless the contrary is expressly made to appear. The court, however, stated that such instruction would be correct if the alleged employment had been made for the treatment of injured employees only: "There is no legal obligation resting upon the company to provide medical or surgical care," said the court, "for those who have been injured in its (railroad) services, but the ground on which the authority of its superintendent to make such contracts is inferred, is that it is a reasonable thing for the company to provide for the care and cure of persons who are engaged in the hazardous employment of railroading. This risk is incurred by them while they are devoting their energy and labor to promoting the interests of the company, and they are generally dependent on the daily labor thus given for the support of themselves and families. Again, they are

of by the plaintiffs in their declaration, and for plea to each and every count in said declaration says as follows:

1. That it never was indebted as alleged.

2. That the defendant is a corporation existing under the laws of a State other than the State of Florida and has its office and principal place of business in the City of Philadelphia, State of Pennsylvania.

skilled in the particular branch of the service in which they are engaged, and their injury, to some extent, interferes with the business of the company, and retards the operation of the road. The company is therefore interested in the speedy cure of employees who have been disabled, and in their early resumption of the duties for which they have been especially trained."

An assistant superintendent of a railroad company who occupies practically the same position as a "general manager" of the company's affairs, is authorized by virtue of his position to employ a hotel keeper to furnish board and attendance at the expense of the company to a brakeman who was injured while working for the company. In the course of the opinion the court said: "It does not appear from the evidence that there was any legal liability on the part of the railroad company to furnish board and attendance to the brakeman. Still, we do not think this proof was necessary to establish the liability of the company to Reisner (plaintiff). It was proven that the brakeman was hurt while in the employ of the company; and it is not infrequent for railroad companies and other corporations to furnish board and medical attendance to employees disabled in the service of such companies even when the injuries are not the result of the negligence of the corporation. Such action whether resulting from humane or selfish motives, is certainly to be commended; and no court should take the contract of a railroad company duly entered into for such an object as *ultra vires*, and incapable

of being enforced. Hyde, being the general agent of the company, and having unlimited authority as to all of its business, had the power to make the arrangements with Reisner, testified to, and the company is liable upon his engagement. Defendant in error was not compelled to institute inquiry as to the moral or legal liability of the railroad company to take care of the disabled employee before receiving him into his hotel, after the general agent of the company had agreed that the company would pay for the board and service." *Atlantic & P. R. Co. v. Reisner*, 18 Kan. 458, 15 Am. Neg. Cas. 736n (1877).

A division superintendent was held in *Union P. R. Co. v. Winterbotham*, 52 Kan. 433, 15 Am. Neg. Cas. 737n, 34 Pac. 1052 (1893), to have authority to employ physicians and surgeons to attend a brakeman whose foot was crushed while in the services of the defendant railroad company.

The court was equally divided in *Marquette & O. R. Co. v. Taft*, 28 Mich. 289, 15 Am. Neg. Cas. 737, 738 (1873), upon the question whether or not a railroad company could be bound by the act of its general superintendent in the employment of a physician and surgeon to attend a laborer who had been accidentally injured in the course of his employment. In the course of his opinion, Cooley, J., said: "The nature of the powers of a railway superintendent is indicated in the title of his office. He has the general superintendence of the business of the corporation and is the immediate representative of the corporation in all

That this defendant denies that it employed the plaintiffs, or that the plaintiffs at the special instance and request of this defendant furnished medical attendance, advice and medicine to and for one Thomas Urquhart, an employee of this defendant, and denies that the plaintiffs were ever employed by the President, Sec'y, Treas., Gen'l Mgr., or Board of Directors of said defendant, or by any other person

business transactions with the public. This is the general fact, though there are undoubtedly cases where these general powers are, in part at least, conferred upon the president or some other officer. There is no evidence that this case was exceptional, and we must consequently assume that this superintendent had the usual powers of general supervision. In all that pertains to the general management and operation of the railroad he speaks and acts for the company, and he must decide for it, and make contracts on its behalf in the emergencies which unexpectedly arise, connected with, or growing out of the running of their trains, the transportation of persons or property, and the control of servants. * * * These are well understood rules, and we know of no limitations upon his powers which confines him to a recognition of obligations of a strict legal nature only, or which can forbid his meeting and providing for the moral obligation which the employer, of an injured person, ought in common humanity to recognize and provide for, whether required by law to do so or not."

An English case lays down the broad rule that a general manager has, as incident to his employment, power to bind the company to pay for surgical attendance rendered at his request to a servant of the company injured by an accident. *Walker v. Great Western R. Co.*, L. R. 2 Exch. 228, 15 Am. Neg. Cas. 739n (1867).

But in a Missouri case it was held that no recovery can be had against a railroad company for drugs furnished,

on the order of the division superintendent of the road, to a person who had been hurt by the company's locomotive, without proof that he was authorized to give such order; the courts cannot take judicial notice of the duties of such an officer. *Brown v. Missouri, etc. R. Co.*, 67 Mo. 122, 15 Am. Neg. Cas. 741n (1877).

2. Emergencies.

Cases which deny the authority of a subordinate employee of a railroad company to bind the company for medical or surgical attendance rendered an injured employee, extend the authority of such employees when the emergency is great and the injury sustained at a distant point, so that communication with the higher officials of the railroad company is impossible. *Sevier v. Birmingham, S. & T. R. Co.*, 92 Ala. 258, 15 Am. Neg. Cas. 739n (1890); *Arkansas S. R. Co. v. Loughbridge*, 65 Ark. 300 (1898); *St. Louis, A. & T. R. Co. v. Hoover*, 53 Ark. 377, 15 Am. Neg. Cas. 739n (1890), in which the court said: "It has been held that where such injury is done at a distant point from the chief office of the company, and there is urgent necessity for the employment of a surgeon to render professional services to an injured employee, the conductor, if he is the highest agent of the company on the ground, has authority to bind the corporation by the employment of a surgeon to render services required by the emergency. The authority existing in such case is exceptional; it grows out of the present emergency and the absence—and consequent inability to act—of the railway's managing agent:

or persons, agent or agents of the defendant having authority, implied or otherwise, to employ the plaintiffs for medical attendance, advice and medicine, to and for the said Thomas Urquhart, an employee of the company, the defendant, and who was injured by an accident for which this defendant was in no way liable.

And this defendant further says that if the plaintiffs performed any

its existence cannot extend beyond the causes from which it sprang."

"As a general proposition," said the court in *Sovier v. Birmingham, S. & T. R. Co.*, 92 Ala. 258, 15 Am. Neg. Cas. 739n, "a master is under no legal obligation to provide surgical attendance for an injured employee, though the injuries which rendered such attendance necessary, may be received while in the performance of his employment, may be regarded as elementary. Humanity, however, imposes upon the company engaged in such hazardous business, moral obligation, when a person in its employment, without fault on his part, is injured while rendering service, to provide such assistance as may be necessary to prevent loss of life, or irreparable injury. This much is demanded by humanity, fair dealing, and the conservation of the interests of the company. Hence, if power for this purpose is not expressly conferred by charter or by the law, authority to incur such liability by contract will be implied; and as the corporation must act by agents, the authority, in the absence of positive proof, of an officer or agent to make such contracts binding on the company may be inferred, from the injury, scope and extent of his usual powers and duties; its exercise resting in his discretion and judgment. The general superintendent, having supervision of the general management and operation of the road, including the employment, discharge and control of employees, may, in an emergency, make any contracts connected with, or necessary to running the trains."

"The rule is well settled in this State," said the court in *Chicago & A. R. Co. v. Davis*, 94 Ill. App. 54 (1901), "that where an accident happens to an employee of a railroad company, and the local surgeons of the company are not in the vicinity, and the condition of the injured employee requires prompt medical attention, the representative of the company in authority at the time and place of the injury has the right to employ medical assistance. If a doctor is sent for by such representative of the company and, at his instance, performs professional service for the injured employee, the company will be held liable to pay for such services."

A conductor has power to employ medical attendance and engage shelter, board, and nursing for a brakeman whose skull was crushed in the discharge of his duty as an employee of the railroad company, at a point remote from the general offices of the company, where the conductor was the highest officer of the company present and the seriousness of the accident demanded immediate attention to protect the life of the injured man. *Toledo, St. L. & K. C. R. Co. v. Mylott*, 6 Ind. App. 438, 15 Am. Neg. Cas. 736 (1892). The court said: "Shelter, food, care and attention are as absolutely necessary to a wounded and helpless man as medical attendance. Without these he would have surely died as without a surgeon or physician, and when the injured man is entirely helpless, without means to procure them, has no one other than his employer present upon whom the obligation rests to pro-

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medical service, furnished any medicine to the said Thomas Urquhart, an employee of this defendant, that said service, advice and medicine were furnished to the said Thomas Urquhart and became an individual charge against said Urquhart, and the same is not a charge against this defendant upon any special agreement or promise to answer for the debts, defaults or miscarriages of the said Urquhart; that such

vide them, and no one voluntarily assumes this duty, we can see no reason why the same principle should not govern which justifies and requires the procuring medical attendance by the company."

In *Southern R. Co. v. Humphries*, 79 Miss. 761 (1901), it was held that a train master has authority to bind a railroad company for professional services rendered an employee of the company who had sustained injuries in the service of the company and who required immediate surgical attention. It appeared in this case that the train master was acting at the time as division superintendent, and, as such, was empowered to employ a physician in cases of emergency, notwithstanding the fact that the company had surgeons in its employ elsewhere on its line who were not within call.

Also, in *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 15 Am. Neg. Cas. 734 (1884), it was held that where a brakeman was injured in the course of his employment at a point distant from the chief offices of the railroad company and there was urgent necessity for the employment of a surgeon to attend him, the conductor of the train to which the brakeman belonged, if he is the highest agent of the company on the ground, has authority to bind the company by the employment of a surgeon to render professional services to such injured employee. In speaking with reference to the general authority of a subordinate employee, the court said: "In ordinary cases, a conductor or other subordinate agent has no authority to employ surgical assist-

ance for a servant of the corporation who receives an injury or becomes ill. We do not doubt that the general rule is that a conductor has no authority to make contracts with surgeons, and if this principle governs all cases the discussion is at an end; but we do not think it does rule every case, for there may be cases so strongly marked as to constitute a class in themselves and one governed by a different rule. The authority of an agent is to be determined from the facts of the particular case. Facts may exist which will greatly broaden or greatly lessen an agent's authority. A conductor's authority in the presence of a superior agent may dwindle into insignificance; while in the absence of a superior it may become broad and comprehensive. An emergency may arise which will require the corporation to act instantly, and if the conductor is the only agent present, and the emergency is urgent, he must act for the corporation, and if he acts at all, his acts are of just as much force as that of the highest officer of the corporation. In this instance the conductor was the highest officer on the ground; he was the sole representative of the corporation; he it was upon whom devolved the duty of representing the corporation in matters connected within the general line of his duty in the sudden emergency which arose out of the injury to the fellow-servant immediately under his control; either he, as the superior agent of the company, must, in such cases, be its representative, or it has none. There are cases where the conductor is the only representa-

special agreement or promise, if any, was not in writing and signed by this defendant, or by any person thereunto lawfully authorized.

All of which this defendant is ready to verify and puts itself upon the Country.

WHITFIELD, C. J. The declaration herein is as follows: "John B. Leffingwell and Ned C. Berry, co-partners doing business under the

tive of the corporation that in the emergency it can possibly have. There are cases, where the train is distant from the supervision of superior officers, where the conductor must act, and act for the company, and where, for the time, and under the exigencies of the occasion, he is its sole representative, and if he be its only representative, he must, for the time and the exigency, be its highest representative. Simple examples will prove this to be true. Suppose, for illustration, that a train is brought to a halt by the breaking of a bolt, and that near by is a mechanic who can repair the broken bolt and enable the train to proceed on its way, may not the conductor employ the mechanic? Again, suppose a bridge is discovered to be unsafe, and there are timbers at a neighboring mill which will make it safe, may not the conductor, in behalf of his principal, employ men to haul the timber to the bridge? Once more, suppose the engineer of a locomotive to be disabled, and that it is necessary to at once move the train to avoid danger, and there is near by a competent engineer, may not the conductor employ him to take the train out of danger? In these examples we mean to include, as a silent factor, the fact that there is an emergency allowing no time for communicating with superior officers, and requiring immediate action. If it be true that there are cases of pressing emergency where the conductor is on the special occasion the highest representative of the company, then it must be true that he may do, in the emergency, what the chief officer, if present,

might do. If the conductor is the only agent who can represent the company, then it is inconceivable that he should, for the purposes of the emergency, and during its existence, be other than the highest officer. The position arises with the emergency, and ends with it. The authority incident to the position is such, and such only, as the emergency imperatively creates. Assuming, as we may justly do, that there are occasions when the exigency is so great, and the necessity so pressing, that the conductor stands temporarily as the representative of the company, with authority adequate to the urgent and immediate demands of the occasion, we inquire what is such an emergency as will clothe him with this authority and put him in the position designated. Suppose that a locomotive is overturned upon its engineer, and he is in immediate danger of great bodily harm, would it not be competent for the conductor to hire a derrick, or a lifting apparatus, if one were near at hand, to lift the locomotive from the body of the engineer? Surely some one owes a duty to a man, imperilled as an engineer would be in the case supposed, to release him from peril, and is there any one upon whom this duty can be so justly put as upon his employer? The man must, in the case supposed, have assistance, and do not the plainest principles of justice require that the primary duty of yielding assistance should devolve upon the employer rather than on strangers? An employer does not stand to his servants as a stranger, he owes them a duty. The cases all agree that some duty is owing

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firm name of Leffingwell & Berry, plaintiffs, by their attorneys Singeltary & Reaves, sue the Atlantic Refining Company, a corporation, for money payable by the defendant to the plaintiffs for this, that heretofore, to wit, on the 1st day of May, A. D. 1906, the said defendant was indebted to the plaintiffs for medical attendance, advice, and medicine given and provided by the plaintiffs to and for one Thomas

from the master to the servant, but no case that we have been able to find defines the limits of this duty. Granting the existence of this general duty, and no one will deny that such a duty does exist, the inquiry is as to its character and extent. Suppose the axle of the car to break because of a defect, and a brakeman's leg to be mangled by the derailment consequent upon the breaking of the axle, and that he is in imminent danger of bleeding to death unless surgical aid is summoned at once, and suppose the accident to occur at a point where there is no station and when no officer superior to the conductor is present, would not the conductor have authority to call a surgeon? Is there not a duty to the mangled man that some one must discharge? And if there be such a duty, who owes it, the employer or a stranger? Humanity and justice unite in affirming that some one owes him a duty, since to assert the contrary is to affirm that upon no one rests the duty of calling aid that may save life. If we concede the existence of this general duty, then the further search is for the one who in justice owes the duty, and surely, where the question comes between the employer and a stranger, the just rule must be that it rests upon the former."

Likewise, in *Evansville & Richmond R. Co. v. Freeland*, 4 Ind. App. 207, 15 Am. Neg. Cas. 735n (1891), it was held that a surgeon who, at the direction of the conductor, amputated the leg of an employee who had been injured in an accident to a construction train by which a large number of other em-

ployees were also injured, the local surgeon of the company being unable to attend to all the employees wounded, is entitled to recover compensation for his services in performing such operation, but not for services rendered by him after the emergency had ceased.

A conductor has authority to employ a surgeon to give assistance to a brakeman on his train who has been injured in the performance of his duties, and the railroad company will be bound to pay for professional services so rendered; but the conductor has no authority to employ additional surgeons to render service to the injured man. In discussing the facts in this case the court said: "Dr. Judah, a competent and skillful surgeon, of Stinesville, was called to treat the injured man. He set, dressed, and bandaged the broken limb, and gave the unfortunate man such treatment as his injury required. After the broken limb had been set and bandaged the conductor caused the appellees, who lived at Gosport, to be summoned by telegraph, and one of them obeyed the summons and treated the patient in conjunction with Dr. Judah. The appellant had fully discharged his duty to its injured brakeman when it procured the services of a competent surgeon. The conductor had no authority to employ other surgeons, for his authority was special, not general, and it did not extend beyond the duty created by the emergency which required him to act. With that duty his authority arose, and with it terminated. He had authority to do what the emergency demanded, in order to

Urquhart, an employee of the defendant, at the special instance and request of the said defendant of the value of \$1,000; and in the further sum of \$1,000 for work and labor done by the plaintiffs for the defendant, at its request; and in a like sum for money found to be due the plaintiffs from the defendant on an account stated between them; and in a like sum for interest on divers sums of money for-

preserve his injured fellow-employee from serious harm, but he had no authority to do more. When the company had procured the services of a competent surgeon it did all that it was morally or legally bound to do, and the conductor could not impose upon it any greater obligation. We hold that the conductor did have authority to at once employ the surgical aid demanded by the urgency of the occasion; but we hold, also, that his authority did not extend beyond this limit. * * * It is immaterial whether Dr. Judah was called by a brakeman or by the conductor in person; for, if he was called by the direction, express or implied, of the conductor, or if the conductor confirmed what had been done, he could not subsequently employ another surgeon. It is possible that Dr. Smith may be entitled to compensation for one visit, that made in obedience to the telegram, for it may be that he had a right to act upon it at once, but when he found that the injured man attended by a competent surgeon he had no right to continue to give the case attention, and charge the company. He was bound to know that when the agent, who possessed limited special authority, had procured the services of a competent surgeon his authority was exhausted, and if, with this knowledge, he continued to give the injured man attention, he did it at the expense of some other person than the agent's principal." *Louisville, N. A. & C. R. Co. v. Smith*, 121 Ind. 353, 15 Am. Neg. Cas. 735n, 6 L. E. A. 320 (1899).

In *Terre Haute & I. R. Co. v. Brown*, 107 Ind. 336, 15 Am. Neg. Cas. 740n (1886), it was held that a freight conductor had authority to employ a surgeon to perform an operation on the foot of a brakeman who was injured in the course of his employment and to bind the company for services so rendered; but he cannot authorize or empower a surgeon so employed at the expense of the company, to employ such assistance as he may deem necessary. "No rule in the law of agency is better settled," said the court, "than that where the agent has authority to do a particular thing, he must do it himself. He cannot, unless specially authorized, or in the pursuance of some usage delegate his authority to another. * * * If the surgeon first employed found it necessary or convenient to call in other assistants, in order to accomplish that which he had been employed to do, in the absence of other employment than such as appears in this case, the assistants must look to him for compensation. This is according to the well-settled rule that if an agent employs a sub-agent to do the whole or any part of that which he was employed to do, without the knowledge or the consent of his principal, inasmuch as there is no privity of contract between the principal and the sub-agent, the latter will not be entitled to claim compensation from the principal." In speaking of the authority of the conductor in the first instance to employ medical assistance, the court said: "Because the brakeman was injured and was in the employment of the railroad company, did not

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borne by the plaintiffs to the use of the defendant, at and before the date aforesaid; and being so indebted, the defendant, in consideration of the premises, promised to pay to the plaintiffs the said several sums of money so due them as aforesaid which the plaintiffs have often requested the defendant to so do, but the said defendant has disregarded its said promise and has failed, neglected, and refused

of itself confer authority upon the conductor to create an obligation against the company for surgical attendance. So far as appears the brakeman may have been abundantly able, with the money in his pocket to employ, at once all necessary surgical attendance. Both the conductor and the surgeon may have known of his ability to procure and pay for all needed assistance, and the surgeon may have been entirely willing to treat him on his own credit or responsibility."

A subordinate officer or agent of a railroad company has no authority to employ surgical attendance for a servant injured in the performance of his duty, or persons injured by the company's trains, except in case of emergency, and when such emergency has ceased their authority terminates. *Bedford B. R. Co. v. McDonald*, 12 Ind. App. 620, 15 Am. Neg. Cas. 743 (1895).

B. Of Other Companies.

1. In General.

The right of a superintendent of a manufacturing corporation to bind the company for medical services rendered an injured employee, was denied in *Sourwine v. McRoy Clay Works*, 42 Ind. App. 358 (1908), on the theory that corporations whose "business is stationary" are under no duty to furnish their workmen with medical attendance. "The cost and expenses of medical services," said the court, "which might be fastened upon innocent stockholders, if the president and general officers of such corporations (manufacturing) were given power to incur obligations of such a character,

would probably, in view of the great number of accidents which are constantly happening, be considerable, and the payment thereof might seriously interfere with the attainment of corporate ends. There might be occasional instances in which prompt medical service would be advantageous to the company; but as a rule the severity of the injury does not affect the question of its liability, and ever should death result from the failure of immediate aid the amount and basis of liability would not be changed. Persons employed by stationary corporations, such as coal mining and clay companies, should, if they desire surgical attention, make provisions therefor in advance, for they must know that accidents are likely to happen. If they fail to do so, and 'their families, friends and acquaintances,' fail to come to their aid, charitable doctors are to be found in every community who respond to that call to which 'stationary corporations' are by law deaf. It is possible that the legislature might burden the exercise of corporate franchises by a condition requiring emergency aid to be given to servants who suffer injury through the negligence of such corporation, or even through their own negligence, but no such statute has been pointed out."

Authority on the part of a "general business manager" of a manufacturing corporation to bind the corporation for medical services rendered by a physician to a 14-year-old boy who was injured while in the performance of his duties, was held in *Swazey v. Union Mfg. Co.*, 42 Conn. 556, 15 Am. Neg. Cas. 741n (1875), not to be implied

to pay the said several sums of money to the plaintiffs, or any part thereof, to the great damage of the plaintiffs, wherefore they bring this suit and claim as their damage the sum of nineteen hundred dollars."

A trial was had on a plea of never was indebted as alleged. Verdict and judgment for \$1,000 and interest were rendered for the plain-

from the fact that the manager had reason to believe that the injury to the boy was caused by the negligence of the corporation, or that he employed the physician to save the corporation from pecuniary loss or damage on account of the injury, or that the sum so expended was small. In this case no attempt was made to show by specific evidence that the injury to the boy was the result of the negligence of the corporation, or that the manager had been empowered to bind the corporation for the payment of the services of the physician, but plaintiff relied simply upon the legal inference to be drawn from the fact that the one who employed him to render such services was the business manager of the defendant. The court said: "Upon this record there remained a question of fact as to the extent of Mr. Tuck's authority to bind the corporation by his agreement that it should pay the plaintiff for medical services to Middleton, which should have been submitted to the jury; for, the name given in the motion to the office held by Tuck, to wit, general agent or general business manager, does not furnish a fixed legal standard by which his powers can be measured; it does not put any definite limitations upon them; he did not hold an office known to the law with duties prescribed with such certainty as that the court can assume judicial knowledge of them; nor does the reasonableness of his belief that the defendant was liable for negligence furnish the true test by which his powers are to be determined. He was a servant of the defendant, appointed by its di-

rectors. The extent of his power to bind the corporation depends in part upon its by-laws, if any such there be, touching his office; in part upon the language of the vote of the directors appointing him, if any such appears of record; in part upon their knowledge and approval of, or the acquiescence of the corporation in, acts performed by him; and in part upon usages which may be shown to exist controlling the matter. Nor is there any rule of law by which the question as to his power to bind the corporation by his agreement in this case, is made to turn upon the magnitude or the insignificance of the sum involved; no principle can be made to rest upon such an unstable foundation."

In *Holmes v. McAllister*, 123 Mich. 493, 15 Am. Neg. Cas. 742n, 48 L. R. A. 396 (1900), it was held that the owner of a laundry was not liable for the services of a physician summoned by the forewoman to attend an employee who had been injured by an accident during the employer's absence. In speaking of the authority of the forewoman to bind the employer for professional services, the court said: "If she was clothed with any authority to do so, it must be because an emergency arose which it was the defendant's duty to have some one to act for them. There are authorities which hold parties liable in certain emergencies for the acts of their managers or foremen in employing physicians. These authorities, however, go no further than to hold the parties liable for the immediate services made necessary by the present

tiffs, a new trial was denied, and the defendant took writ of error with a bill of exceptions. The transcript contains no evidence of an account stated, or of a promise to pay as alleged, therefore the last two counts of the declaration may summarily be regarded as not proven in whole or in part. The other two counts are based on services alleged to have been rendered, the second at the defendant's request,

urgency. Authority to act is implied from the necessity of the case. * * * Neither the authorities nor reason carry the rule beyond the emergency. Such employment does not make the employer liable for the services rendered by the physician to the employee after the emergency has passed. If the physician desires to hold the employer responsible for subsequent services, he must make a special contract with him. * * * There is no evidence in this case that employment in a laundry is accompanied by any such dangers. We may infer the contrary, as no accident had ever before occurred in the defendant's business, an extensive one. An employee in a bank, store, or shop or upon the farm, may become suddenly very ill, or in some way seriously injured, so that some foreman or other employer might properly deem immediate medical attendance necessary, and in the absence of employer, summon a physician. Is the employer liable? We are cited to no authority which so holds. It is doubtful whether such an employer would be liable if he himself sent for the physician to attend one of his employees."

The president of a mining company who also performs the duties of general manager of the company, has no implied authority, at least in absence of unusual circumstances creating an emergency, to employ a physician and surgeon at the expense of the company to attend an employee who was injured in the course of his employment, but not as the result of the negligence of the company, so far

as the evidence discloses. The court in this case recognized the rule that the superintendent or other officers of a railroad company may in some instances have authority to bind the company for medical services rendered to injured employees. "But," said the court, "this exception relating to railroads has no bearing on the question before us. The appellee is a coal mining corporation, a strictly private corporation. Its business is stationary. Its employees perform their duties in one general working place, near their homes, families, friends and acquaintances, and have the same facilities for hastily summoning medical and other aid in time of pressing emergency, as may be possessed by the corporation. There is no greater or different reason for holding a private mining corporation responsible for supplying medical aid for its employees than appertains to all kinds of manufacturing bodies; we perceive no reason why corporations of either class, under ordinary circumstances, should be required to furnish their workmen with medical service any more than they should be required to furnish them with their dinner. The policy of the law is to protect the employee equal with the employer, in the fullest freedom of choice in supplying his personal wants of every kind, whenever he is as capable and well prepared as his employer to act for himself. We do not, however, hold that a case cannot arise with a mining or manufacturing company, or even with an individual, wherein the facts may be so unusual and extreme as to impose upon the employer a duty analagous

and the first at the defendant's special instance and request.

The evidence in effect is that on February 9, 1906, an employee in the mining plant of the defendant corporation was injured by machinery in the plant, and a superintendent of the mine, Mr. Wadham, telephoned the plaintiff Leffingwell, a physician, to come to the injured man and to bring another doctor with him. The two plaintiffs went to

to that imposed upon railroad companies. . . . We are not informed even of the nature of his employment, whether as engineer, blacksmith, miner, or other particular servant. Neither are we informed of the nature or extent of his injury, nor the facts which created the emergency which imposed upon the coal company the duty of employing plaintiff. It is not averred that the injured employee was unable to help himself, or that he had no money, or credit, or family or friends present to give him assistance, nor is it shown by the complaint that there existed any other reason why he was not as able and competent as the company to speedily summon a physician. The averment that the injured party's wounds were so severe as to create emergency for the immediate attention of a physician and surgeon in order to save life is pleading the boldest conclusion." *Cushman v. Cloverland Coal & Min. Co.*, 170 Ind. 402, 16 L. R. A. (N. S.) 1078, 27 Am. St. Rep. 391 (1908).

Also, in *New Pittsburg Coal & Coke Co. v. Shaley*, 25 Ind. App. 282 (1900), it was held that the manager of a coal and coke company cannot bind the company by the appointment of a physician to render services for the benefit of an employee who had been injured while in the discharge of his duty, in absence of any proof that such employment was within the scope of the manager's power. The court stated that the doctrine on which the right of the manager of a railroad to bind his company by the employment of a physician was based, is

inapplicable in the case of a private corporation.

In a Montana case the court held that the general manager of a mining company is not presumed to have implied authority to render the company liable for medical or surgical attendance given an employee who was injured by the explosion of a blast in the course of his employment, without any fault on the part of the company. In the course of the opinion the court said: "It does not appear that the company was in any wise at fault (for the injury to its employees); the employment of the plaintiff (physician) by Beaton and Looney who assumed to act in the name of the company, being of itself no evidence that the defendant was negligent, or that in their opinion it was responsible for the accident. The men were removed to a hospital, with which the defendant had no connection or contract whatever, and were there treated by physicians and surgeons, to whom the general manager of the defendant made promises to the effect that the defendant would pay them. There was nothing tending to show that the general manager had theretofore assumed so to bind the defendant; there was nothing to show that the corporation had in any manner whatever expressly delegated to the general manager authority to exercise such power, nor was there any evidence that general managers of mining corporations habitually exercise that power. Can the court declare, upon this state of facts, that the general manager of the defendant possessed

the place several miles distant in Leffingwell's launch, and were met by the superintendent, Mr. Wadham, who called the physician, and Mr. Parmenter, another superintendent of the mining plant, who took them to the injured man, and asked them to take charge of him, and Mr. Parmenter asked for a statement of the condition of the injured man to be sent to the home office of the corporation in Philadelphia,

authority to bind the defendant by employing physicians and surgeons? We think not. While there can be no doubt of the implied power of a corporation of the class to which the defendant belongs to incur expense on account of injuries received by its employees in the line of their employment, in the absence of any express statutory grant of such power (5 Thomp. Corp. § 5840), the law unquestionably is that such a corporation does not owe to its employees any implied legal duty to do so. Without attempting to enumerate every duty of the master, we may say, in general terms, that a corporation, like any other master, discharges its primary duties as master to the servant when it furnishes him with a reasonably safe place in which to work, reasonably safe tools with which to work, and uses reasonable care in selecting fellow-servants, or, rather, is free from negligence in these three respects. It would not seriously be asserted that a natural person owes to his servant or employee the legal duty to furnish medical or surgical aid to him, or to nurse him when sick or disabled, or when injured while working for the master or employer; indeed, we apprehend the law does not impose such obligation upon him in any event without an agreement by which he assumes such a burden. For instance, a servant suffers a bodily injury through the actionable negligence of the master; although the master must answer to the servant in damages for loss proximately resulting, including physicians' and surgeons' charges, yet the law

does not require him to engage their services, or to pay them for performing the services. He may, if he chooses, employ physicians, surgeons, and nurses, and promise to pay them, and, of course, he would then be liable directly to those employed. Whether or not, in such a case as the one last suggested, the general manager of a mining company can bind his principal, is not necessary to be decided upon this appeal. If he can, the power must rest upon the assumption or theory that in appointing a general manager the company impliedly delegates to him authority to lessen the extent of the injuries inflicted by the principal's wrong, and thereby diminish the amount of damages for which the latter would otherwise be liable. * * * He cannot, however, bind his principal by a contract to confer a gratuity or bestow a charity, however strong the promptings of humanity may be. He acts for and is virtually the company itself in those matters only which have to do with its ordinary business, and are within the scope of the duties delegated to him for performance. Unless the limits of his authority are shown to have been enlarged, the duties of the general manager are confined to the transaction of the business of the corporation as distinguished from its mere ethical duties and consequent imperfect obligations or supposed charities. The fact that a certain person is general manager of a mining company does not, in and of itself, imply authority in him to bind the company in matters other than those of business affairs. It may not

Pa. The superintendent stated to the doctors that the man was injured by the machinery of the defendant, and requested the physicians to take charge of the injured man who was unknown to Leffingwell, and to give their medical services to him. The injured man was removed to his home where the physicians attended him on different days before March 1, 1906. On March 1, 1906, the plaintiffs in a let-

be said, as matter of law, or declared as a fact judicially known, that general managers of mining corporations are usually clothed with such authority as that assumed by Loomis. So to hold would be to affirm that every general manager may contract with physicians and surgeons in behalf of the mining corporation for which he is an agent, irrespective of the rights of the company and without regard to whether it was at fault. If he has such authority by virtue of his office, then he may bind the company to pay for the services and expenses of physicians, surgeons and nurses, and others rendered to and paid out for men who, through their own gross negligence, have suffered injuries in his company's mines, and his promise in the name of the company to pay any price that might be agreed upon by him and those employed would (in the absence of fraud) bind the corporation." *Spelman v. Gold Coin Min. & M. Co.*, 26 Mont. 76, 15 Am. Neg. Cas. 742, 66 Pac. 597, 55 L. R. A. 640, 91 Am. St. Rep. 402 (1901).

But, in *Mount Wilson Gold & S. Min. Co. v. Burbidge*, 11 Colo. App. 487, 53 Pac. 826 (1898), it was held that the general superintendent of a mining company who has full charge of the business and property of the company is presumed to have authority to bind the company to pay for the hospital expenses of a miner who was injured by the company's machinery, especially in view of the fact that his company had paid other bills contracted by him in caring for such employee, and in an action for services so rendered

the company made no attempt to rebut the presumption of authority.

The fact that a corporation engaged in mining oil and the development of oil lands, paid the expenses of taking a laborer, who was dangerously injured in the service of the company, from the company's works to a private hospital where he was cared for, is sufficient to create a presumption that the president of the corporation who had general charge of the business of the corporation in a county other than the one in which its office was located, had authority to bind the company for medical services and nursing rendered the injured person during the time of his illness caused by the injury so received. *Scott v. Monte Cristo Oil & Develop. Co.*, 15 Cal. App. 453, 115 Pac. 64 (1911).

A corporation engaged in the manufacture of ice cream is not liable for the services of a physician rendered to an employee of the corporation, at the request of the president and secretary, in the absence of proof showing that such contract came within the purposes for which the corporation was created, that such officer had authority actual or implied, or that the corporation derived any benefit from the rendition of such service. *Harris v. Vienna Ice Cream Co.*, 46 Misc. (N. Y.) 125, 91 N. Y. Supp. 317 (1904).

The superintendent of the cartoon department of a lithographing company who is authorized to employ and discharge men, has not, by reason of such power, authority to bind the corporation for the payment of medical or surgical treatment of an employee

ter addressed to Mr. Parmenter reported the condition of the patient and said: "Inasmuch as we have not seen you for some time we would be glad to have some expression from you in regard to our services in this case." No reply to the letter was received, and a few days later Mr. Parmenter, when asked about the compensation, told the plaintiff Leffingwell that the defendant company would not

who was injured in the machinery of the factory. *King v. Forbes Lithograph Mfg. Co.*, 183 Mass. 301 (1903).

Liability on the part of a telephone company for medical services rendered one of its employees who fell from the top of a telephone pole to the frozen ground, thereby fracturing his arm at the elbow to such an extent that the ends of the broken bones protruded through his coat into the earth, at the request of the foreman in charge of the working gang of which the injured man was a member, was denied in *Salter v. Nebraska Telephone Co.*, 79 Neb. 373, 13 L. R. A. (N. S.) 545 (1907), on the theory that the case was not one for emergency treatment, such as would authorize the highest general officer of the company present at the time of the accident to bind the company for necessary medical attendance. It appeared in this case that a member of the defendant company, when asked about payment for professional services, informed the party so asking that the company did not hold itself responsible for attendance, except for the first treatment.

2. When Injury Result of Employer's Negligence.

But it has been held that where the injury sustained by an employee is due to the negligence of his employer, the superintendent and general manager has authority to employ a physician and surgeon to attend such employee. In speaking of the general liability of a master, the court said: "We adhere to the doctrine that an unauthorized employment of a physician or

surgeon to wait upon an injured servant cannot bind the master for payment of the surgeon's services, although the master may have been aware that the surgeon was rendering the service. In such case, ordinarily, the master is not bound to employ a servant to wait upon one in his employment who may be injured while engaged in his work. However, if the cause of the injury is such that the master would be liable to the servant for damages, including medical bills, because of the master's negligence in any particular, and where the master recognizes this liability, and does employ medical attendance, or ratifies the employment made in his name, with full knowledge of the fact that it has been so made, we perceive no sound reason why he should not pay for them." *Lithgow Mfg. Co. v. Samuel*, 24 Ky. L. Rep. 1590 (1903).

And, where a servant of a mining company has been injured through the negligence of the company, it was held in *Evans v. Marion Min. Co.*, 100 Mo. App. 670 (1903), that the president has authority to bind the company for medical services, since he has charge of the general business and welfare of the company, which is served by decreasing the amount of damages for which it would be liable on account of its negligence. The court said: "It (the company) was directly interested in seeing that such injuries were not made worse by lack of medical attention and that the suffering and other ill consequences, should be lessened in every possible way. Its president or general manager, who is necessarily in

pay the bill; that the injured man "will pay the bill." On February 12, 1906, Wadham and Parmenter, the superintendents, wrote the vice-president of the corporation at Philadelphia, Pa., of the condition of the injured man, and that a physician who rendered immediate services charged \$5, and stated that physicians at that place charge not less than \$5 a visit, and that the two who were attending the man

charge of its general interest and welfare, was certainly not acting outside his duty when he was doing that which lessened the damage for which it had become liable."

3. Emergencies.

In *Weinsberg v. St. Louis Cordage Co.*, 135 Mo. App. 553 (1909), it was held that the chief executive officer of a manufacturing corporation has the emergency power incident to his office to employ a surgeon to perform an operation upon an employee injured in the performance of his duty; it cannot be expected that the board of directors should assemble to pass a resolution directing a surgeon to act in such a case. See, also, *dictum* in *Holmes v. McAllister*, 123 Mich. 493, 48 L. R. A. 396 (1900); *Cushman v. Cloverland Coal & Min. Co.*, 170 Ind. 402, 16 L. R. A. (N. S.) 1078, 27 Am. St. Rep. 391 (1908).

It was held in *Salter v. Nebraska Telephone Co.*, 79 Neb. 373, 13 L. R. A. (N. S.) 545 (1907), that "when a serious injury requiring immediate medical or surgical services is incurred by the employee of a company engaged in a business dangerous to its employees, and the injury is received at a place distant from the home of the injured party, any general officer of the company then present may engage such medical or surgical care as the case requires, and bind the company for the reasonable value thereof, without any proof on the part of the party furnishing such treatment and care that such general officer of the company had special authority to

make such contract, or that such action on his part came within the general scope of his powers and duties."

In *Meisenbach v. Southern Cooperage Co.*, 45 Mo. App. 232 (1891), defendant's liability for the services of a surgeon called by the superintendent to attend an injured employee, was denied on the ground that no specific evidence was given that he had been previously authorized to summon a physician in cases of emergency.

A foreman who was sent by a building company with a gang of workmen to construct a building at a distance from the home office, was held in *Texas Bldg. Co. v. Albert*, 57 Tex. Civ. App. 638 (1910), to have implied power, being the highest representative of the company on the ground, to act in behalf of the company in employing a physician to render services to a member of the crew who was injured by a car running over his legs. The court said: "We are inclined to believe that, whenever a company employing laborers sends them out under the supervision and control of a foreman, it clothes him with, at least, the implied authority and power to do, not only such things as may be incident to the work in hand, but all things that might be necessary for the advancement of the master's interests. Here the servant was seriously injured in the direct line of his employment. Surely it was to the master's interests that the servant should have medical attention, to the end that he might be the better enabled to perform the master's service; and, outside the doc-

had already made five visits, and also said: "We wish to know what part of these expenses you desire the company to bear. In the only other accident which this department has had to deal with the company paid both the man's wages and his doctor bills, but this was a case of but two weeks' duration." On February 17th the vice-president of the company in reply said: "We have your favor of Febru-

trine of humanity * * * we are inclined to the view that our decision in this case can also rest upon the implied authority, on the part of the foreman, in the absence of the master, to act for him and procure the necessary medical aid for the injured employee, and the foreman in so doing creates a liability against the master for the services of the physicians, for which they are entitled to recover. The principles of justice and the dictates of humanity, in our judgment, and as well as the law, imposed upon the company, under the circumstances disclosed by this record, the duty to furnish the wounded man medical aid; and the foreman acting for it, in the absence of any higher authority, has the implied power to bind the company for the payment of the services of the physicians whom he had employed."

But a foreman in charge of the carpenter work of a building, has no implied authority to hire medical attendance for a man under him who is injured while in the performance of his duties, by a brick falling from a scaffold, so as to render the common employer, which was a corporation, liable for such services. The contention of the plaintiff that the act of the foreman in employing him to render medical attendance made the corporation liable, on the theory that the foreman acted in an emergency which required immediate medical skill, was held by the court to be applicable exclusively to railroad corporations and generally in cases which involved some act of negligence on the part of the company

which caused the injury. *Godshaw v. J. N. Struck & Bros.*, 109 Ky. 285, 15 Am. Neg. Cas. 742n, 51 L. R. A. 668 (1900).

4. When Employee Not in Service.

The right of a physician to recover for professional services rendered, at the direction of the superintendent of a corporation, to one of its employees who was injured while not in the service of the employer, was denied in *Chase v. Swift & Co.*, 60 Neb. 696, 83 Am. St. Rep. 552 (1900).

The secretary, treasurer, and general business manager of a lumber company has no implied authority to bind the company to pay for medical services rendered an employee of the company who was dangerously wounded, not in the course of his employment but in a private brawl. *Dale v. Donaldson Lumber Co.*, 48 Ark. 188, 3 Am. St. Rep. 224 (1896).

C. Of Individuals.

The following case seems to regard the implied powers of the superintendents or managing agents of railroad companies to be more extensive in character than those of other companies, with reference to their authority to bind their principals for medical attendance. The court in *Chaplin v. Freeland*, 7 Ind. App. 676, 15 Am. Neg. Cas. 741n (1893), held that the manager of a wagon factory has no power to bind his employer for medical and surgical treatment given an employee who was injured by the machinery in the course of his employment in the factory, in absence of any facts showing an emergency, save the necessity for the immediate service of a physician or

ary 12th in regard to young Urquhart, who was injured at your plant on February 9th, and we are very happy to learn that the injuries he received are less grave than was first anticipated.

"While we, as manufacturers, are not responsible for doctors' bills incurred in the treatment of injuries received by accident in our factories, in this particular case, we are willing to pay such bills indi-

surgeon. In this case the court distinguished the difference between the authority of the managing agents of railroad companies and those of other companies by saying: "Railroad companies occupy a peculiar position with reference to such matters, exercising *quasi* public functions, clothed with extraordinary privileges, carrying their employees necessarily to places remote from their homes, subjecting them to unusual hazards and dangers. The law has, by reason of the dictates of humanity and the necessities of the occasion, imposed upon such companies the duty of providing for the immediate and absolutely essential needs of injured employees, when there is a pressing emergency calling for their immediate attention. In such cases, even subordinate officers are, sometimes, for the time being clothed with the powers of the corporation itself for the purposes of the immediate emergency, and no longer. . . . Usually an injured employee procures and pays for his own attendance, and then, if his employer be in the wrong, recovers this sum from his employer with his other damages. Whether or not such an extreme case might arise that would justify or require the court to impose on individual employers a duty analogous to that imposed upon railroad companies, it is unnecessary for us to determine. There are here no facts showing any emergency save the necessity for the immediate services of a surgeon. No necessity for action by the employer is shown. It does not appear but that the injured man was possessed of abundant means to provide for himself,

nor does it appear that he lacked friends and relatives both able and willing to provide for him."

An agent who was employed as manager of a plantation has no implied authority to bind his principal for medical services rendered hands employed on the place, and the fact that the principal knew that such services were rendered and raised no objection thereto furnished no ground on which to hold him liable, since he was under no obligation to furnish medical attendance. *Malone v. Robinson*, (Miss.), 12 So. 709 (1893).

A mere bookkeeper and timekeeper for a railroad contractor has no implied power to employ a surgeon, at the contractor's expense, to render medical assistance to one of the latter's laborers who was injured in the course of his employment; nor has the superintendent and general manager for such contractor any authority to bind the latter for such expenses, where his duties are limited to figuring on contracts and seeing that the work contracted for is carried on diligently and in a proper manner. *Harris v. Fitzgerald*, 75 Conn. 72 (1902).

D. Power of Officer to Bind Owner of Boat.

The officer in charge of a tug boat, in the absence of the captain, has power to bind the owner for medicines supplied and professional services rendered, first on board the tug and afterwards at the home of an engineer who was injured by the blowing out of a cylinder-head on board the boat, without any fault on his part. This decision, however, was based on the gen-

rectly. The company assumes no responsibility even for doctors' bills incurred when in emergency a physician is summoned by the company. All bills should be rendered to the patient, and we will advance him such money as is necessary to pay fair and reasonable charges for medical attention. You should pay the emergency doctor's bill of five dollars at once. It is also our wish that the young

eral rule that a seaman is entitled to be cared for at the expense of the ship. *Holt v. Cummings*, 102 Pa. 212, 48 Am. Rep. 199 (1883).

II. OTHER PERSONS INJURED.

A. In General.

The doctrine stated in *Cincinnati, I. St. L. & C. R. Co. v. Davis*, 126 Ind. 99, 15 Am. Neg. Cas. 735n, 9 L. R. A. 503 (1890), is that an employee of a railroad company of such high rank as a general superintendent is presumed to possess authority to employ surgeons and nurses to render services to persons injured by the trains. In commenting on the authority of a general superintendent the court said: "It is quite well settled that a general superintendent has authority to employ surgeons to give attention to persons injured by the trains of the company he represents; it is rightly so held, for, it would be unreasonable to require a surgeon to give professional assistance to a person injured by the company's trains, and then to deny him compensation upon the ground that the superintendent had no authority to employ him because that authority was lodged in a chief surgeon. Nor are we willing to sanction the rule imposing on the surgeon whose services are requested by the superintendent the duty of making specific inquiry as to the scope of the superintendent's authority. Such a rule would operate harshly in many cases, for, if a surgeon must stop to make inquiries before leaving his home or office, the injured man might perish. Better railroad companies should be held responsible for the acts of such a high officer

as a general superintendent, although as between him and his principal that officer may usurp the authority that is vested in a subordinate agent, than that a surgeon who obeys the summons of a superintendent should be compelled to go unpaid. It is the company which selects the superintendent, places him in a position of power and invests him with ostensible authority; if he betrays his trust, the principal by whom he was put in the position of that character should bear the loss, and not the surgeon who in good faith acts upon the appearances created by the company."

In *Louisville, E. & St. L. R. Co. v. McVay*, 98 Ind. 391, 15 Am. Neg. Cas. 735n, 49 Am. Rep. 770 (1884), it was held that courts will presume from the ordinary meaning of the term "general manager," that such officer has the general direction and control of the affairs of a railroad corporation and therefore has authority to bind the company by contracts for nursing, etc., of one who was injured in a tunnel on the line of the company's railroad.

An agent of a railroad company who is employed to settle claims for personal injuries, has authority to bind the railroad company for medical services rendered a passenger who had been injured in a wreck. *Reynolds v. Chicago, B. & Q. R. Co.*, 114 Mo. App. 670 (1905).

It was, however, held by one of the lower courts of New York state, that an agent of a railroad company who stated that the title of his office was superintendent and that as such he had general supervision and control

man should have such nursing and care as is necessary, and we do not wish him to suffer for lack of medicines or surgical appliances. You should make a definite agreement with the nurse as to her charges, and advance the money to the patient, so that he may pay for same. It is essential that the doctors understand that we do not assume the responsibility of their bill, although it is our intention, as stated above,

over the whole line of the road, everything connected with the running of the road being under his supervision and control, and that he paid money to drivers, conductors and other persons employed by him as superintendent, but had no direction over the treasury of the company, has no power to bind the company by a contract employing a physician and surgeon to attend those who had been injured in consequence of the negligence of the company. *Stephenson v. New York & H. R. Co.*, 2 Duer (N. Y.) 341, 15 *Am. Neg. Cas.* 738n (1853). "The only inference deducible from his description of his powers is," said the court, "that they relate solely to making provision that trains are run as prescribed by the company, that means and men are supplied for the purpose, and other things are provided, which are essential or proper to effectuate this general result. His description of his powers, or of the business which he transacts, does not justify the inference that he is authorized, by his office, to arrange and liquidate claims made against the company for the negligence of its servants in running its trains, or to contract with third persons, as its agent, to repair the consequences of such negligence."

B. Passengers.

In an action brought by a physician to recover for professional services rendered, at the direction of the superintendent of a railroad, to passengers who were injured by the accidental derailment of a train, it was held that, as no obligation rested upon the company to furnish medical care and attention under such circum-

stances, the railroad company was not liable. *Union Pacific R. Co. v. Beatty*, 35 Kan. 265, 15 *Am. Neg. Cas.* 737n, 10 Pac. 845, 57 *Am. St. Rep.* 160 (1886). "There is no more obligation," said the court, "resting upon the company to provide medical care and treatment for passengers unavoidably injured, than for passengers who become sick during the journey over the road. In either case the full measure of the duty of the company is to carry the passenger in the condition in which he may be found to his destination. Beyond this the company has no interest in the passenger, and therefore has no such concern for his health and soundness as it has in its employees who may be injured while in its service. To furnish medical care and treatment for passengers in such case would be a mere gratuity, and the funds of the corporation cannot thus be dispensed by the division superintendent without authority from the board of directors."

* * * Perhaps it is true that in certain emergencies the superintendents of railroads are authorized to provide medical and surgical care for injured passengers, and to bind the railroad companies for the payment of such services, and it is probably well that such provision should be made; but in this case it will not be difficult to show the authorization, or a recognized custom or usage of the company to furnish medical attendance to passengers injured by inevitable accident. In the absence of testimony or expressed authority from the company, or of a custom or usage on which

to pay indirectly all fair and reasonable expenses of this kind, for, if the physicians bill the company direct, they are apt to render excessive charges. You are also authorized to advance such money as is necessary for the injured man's current expenses. It is our purpose, when the young man is sufficiently recovered to be about, to make with him a fair and square settlement, notwithstanding we do not believe

authority might be implied, the company cannot be bound by such contracts made by the superintendent or his subordinates. If the injury to the passengers resulted from the negligence of the carrier, other considerations would enter into the case, which might warrant the implication of authority in the superintendent or some general agent of the company to provide medical attendance and entertainment for them."

In an English case it was held that neither the engine driver, guard, nor the superintendent of the traffic department of a railroad company had authority to bind the company for medical services rendered to a passenger who was injured in consequence of the negligence of the company. *Cox v. Midland Counties R. Co.*, 3 Exch. 268, 15 Am. Neg. Cas. 738, 739n (1849). In view of the importance of this case it may be well to quote at length from the judgment of the court. Speaking with reference to the argument of counsel for the plaintiff that each of the servants of the railroad in question had, as an incident to his employment, authority, in case anything happens which would be prejudicial to the interests of the company, to do whatever was reasonably fit under the circumstances to remedy or lessen the damages, Parke, B., said: "It was contended, therefore, that if one of these servants happened to be near at the time of the slip of an embankment which, for the purpose of securing the safe and speedy traffic along the railroad ought to be immediately removed, he would have im-

plied authority, when fresh laborers were required, to bind the company by a contract to pay them; and that, in like manner, any servant who was near, or at all events the head servant of the nearest station, would be authorized, if a passenger received personal damage requiring immediate surgical attendance, to contract with a surgeon, and to bind the company by that contract to pay what was reasonably due to him, such authority being an incident to his employment, considering its peculiar nature, and it being for the benefit of the company that the damage and consequent loss to them from any occurrence for which they were responsible should be as much mitigated as possible. * * *

We are all of opinion that the power to enter into this contract was not incident either to the employment of the guard or the superintendent. The simple employment of servants by a corporation carrying on a business cannot give them, as incident to that employment, a larger authority than if the same appointment were made by a partnership of as many individuals as the shareholders of the company; nor does it appear to us to make any difference that it is carried on by fewer members, or even by single individuals. * * *

Could it be maintained that a coachman from whose carriage a passenger had fallen and broken his arm, or by which another person had been run over, or a horse-keeper who happened to be near, or the bookkeeper, could bind his master by a contract with a surgeon to cure the injured person, and oblige his master

there is any liability on our part. (Judging from the facts submitted in the case.) • • •"

There is evidence that the superintendents of the mining plant had no authority to employ physicians at the expense of the company to attend injured employees, and that the custom of the company was not to allow such a liability to be incurred by its agents or superintend-

to pay the bill? We are of opinion that he could not. Though it might be a benefit to the master to have the damage diminished by a speedy cure, if he was really liable for that damage, it would be a prejudice to him to be bound to pay if he was not; and is the servant to decide whether his master is liable or not,—a man whom he has not appointed with any view to the exercise of such a discretion? We think the servant has clearly no such power."

The doctrine of the Cox case *supra*, seems to have been limited or destroyed by the decision in Langan v. Great Western R. Co., 30 L. T. N. S. 173 (1873). In this case certain passengers injured by a collision on defendant's railway, were carried into plaintiff's inn, by the help of the station master of the station near which the collision occurred. The subinspector of railway police for the district where the accident happened, whose duty it was to attend at the scene of the accident, ordered some brandy to be given to one of the injured passengers, and in reply to a question by plaintiff as to who would pay for the maintenance of the persons injured, replied: "Don't trouble yourself about that; we will see that is right." In an action brought by plaintiff against the railroad company for board, lodging, necessaries, and goods supplied to the injured passengers, the court held that the evidence was sufficient to go to the jury in support of the plaintiff's claim and to show the authority of the subinspector to bind the company for the necessaries supplied. In dis-

cussing the facts, Bramwell, B., said: "Surely it is reasonable to say that the person who is chief in office where the accident takes place should have authority to do those things which must be done at once, and which are presumably for the benefit of the company. Take the case of a number of bystanding laborers who are asked to clear the line; that is not a matter of absolute necessity, but it is presumably for the benefit of the company. Take the case of a person in a state of collapse, to whom a glass of brandy may be of vital importance, could there not be authority to pledge the company's credit for that? and here the question of *quantum* is not raised. If at the outset Locke (the subinspector of police) had said that he was going to pledge the company's credit for six or seven weeks' maintenance of the sufferers, it may be that he would thereby have exceeded his authority. If it were his duty to report what he had done, the company might repudiate any further liability and tell the plaintiff that if she continued to keep the persons injured beyond a certain time she must do so at her own expense. I do not determine, therefore, whether the question of *quantum*, if it were raised, would be determined for or against the railway company. I go on the ground that under the circumstances of the case there was a necessity for immediate action, and there was no one to direct what should be done but Locke." Denman, J., expressed his views as follows: "I think he (the inspector) had authority to do what was reasonable in the case

ents, and there is no testimony that such authority was given the superintendents in this case. Under this testimony the plaintiffs are not entitled to recover on the first two counts which allege that the service was rendered at the special instance and request of the defendant, and at the defendant's request, unless the duties of the superintendents by implication of law gave them authority to request the services for and at the expense of the defendant corporation, notwithstanding the testimony that no such authority was given or contemplated by the corporation or by those who exercise its rights. The liability of the corporation for negligence of its agents and servants that proximately injures an employee may extend to medical services to an injured employee, but this liability does not give rise to a con-

of injured persons, and, *ex necessitate rei*, to take them to a place of security and there have them promptly attended to till the arrival of a doctor. I do not say that it necessarily follows that he would have authority to give orders for the supply of every possible thing that might be comfortable to persons under these circumstances. It depends very much, I think, on the condition of the persons taken in."

C. Trespassers.

In case of emergency it has been held that the highest representative of a railroad company on the ground has implied authority to bind the company for professional services rendered to a trespasser who has been injured by the trains. Thus, the conductor of a freight train which has injured a stranger by backing its engine and cars against him in the night time, at a point far distant from the general office of the company, has implied authority to bind the company for the services of a physician employed to attend him; but the employment of such physician does not include authority to employ assistants. "In so holding the company liable in such an emergency," said the court, "it will be observed that the rationale of the doctrine (of cases cited), whether in case of a stranger and trespasser, or of an

employee or passenger, is found in the duty imposed by the dictates of common humanity. The authorities stress the moral obligation, and find from that the legal duty to alleviate as far as possible the sufferings and to administer to the necessities which the company has contributed, however innocently, to produce. We confess that if the duty, and consequent liability for failure to discharge that duty, grow out of the obligation which the impulses of our common humanity would suggest and impose, under such circumstances, then we do not see that the status or relationship of the party injured to the party producing the injury could affect the question of the appellee's right to recover. For, from the humane viewpoint, clearly it could make no difference whether the helpless and unfortunate victim of the accident were trespasser, employee, or passenger. * * * It is a question of the authority of the conductor to act for his company. The emergency creates that authority. Some one, as Judge Cooley, J., holds, must have authority to represent the company under such circumstances. The conductor is the highest agent on the ground, and is in command of the train that did the injury. Before sufficient time had intervened to ascertain whether the accident was caused by

tract liability for such services. An issue of liability for negligence and the effect of contributory negligence has no relation to the claim here made.

In view of the testimony here it is not clear that the duties of the superintendents of the mining plant are such that the law implies therefrom authority to employ physicians for the company to attend employees of the company injured by its machinery. This being so, a request of the superintendent to render the medical services is not in law a request of the company, and as a consequence the liability of the company is not shown. A new trial should have been granted.

The judgment is reversed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

the negligence of the company, he certainly had at least the implied authority to protect his company by doing what might be necessary to lessen the damages in the event that it should afterwards be ascertained that the company was liable. This authority would be sufficient to bind the company for his contract with the surgeon, but not for the surgeon's contract with others." *Bonnette v. St. Louis, Iron Mountain & S. R. Co.*, 87 Ark. 197, 112 S. W. 220, 16 L. R. A. (N. S.) 1081 (1908).

A railroad company was held liable in *Terre Haute & I. R. Co. v. Stockwell*, 118 Ind. 98, 20 N. E. 650 (1888), for professional services rendered by a physician to a stranger who was struck by a locomotive and injured, where it appeared that the injury was so serious as to require immediate attention, that the point where the accident occurred was many miles distant from the principal office of the company, that the conductor employed the plaintiff to render the services and soon thereafter telegraphed the general agent and superintendent that he had left the injured man under the care of a physician, and that the company did not repudiate the employment so made by the conductor.

But, in *Adams v. Southern R. Co.*, 125 N. C. 565 (1899), it was held that a conductor of a freight train had no implied authority to summon physicians, at the expense of the company, to attend three tramps who were injured when the train ran into a wash out while they were stealing a ride. "There are some emergency instances," said the court, "in which the conductor may engage a physician to nurse the passengers when injured, but as to trespassers on defendant's road no such authority is found to exist."

And in *Wills v. International & G. N. R. Co.*, 41 Tex. Civ. App. 58 (1905), it was held that the conductor of a freight train has no implied authority to bind the company by the employment of surgeons to amputate the leg of a trespasser who was injured while attempting to board the train when drunk, although the case was one demanding immediate surgical attention.

As to Liability of Railroad and Other Corporations for Services Rendered by Physicians and Others to Injured Employees on Contracts Made by the General Officers of Such Corporations, Wherein the Question of Scope of Authority is Involved, see Note in 15 Am. Neg. Cas. 733-745.

STATE EX REL. YAPLE v. CREAMER.

[SUPREME COURT OF OHIO, FEBRUARY 6, 1912.]

— Ohio St. —, 97 N. E. 602.

1. Master and Servant—Police Power—Workmen's Compensation Act.

An Act (102 Ohio L. 524) providing a plan of compensation from a State insurance fund, for accidental injuries sustained by those employed in industrial pursuits pertains to the public welfare and is a valid exercise of the police power.

2. Statutes—Validity—Conjecture.

A statute cannot be set aside upon mere conjecture or speculation that an unlawful result will follow.

3. Master and Servant—Workmen's Compensation Act—Validity—Due Process—Assumption of Risk.

That a Workmen's Compensation Act abolished the defense of assumption of risk does not render it repugnant to State and Federal Constitutions as taking private property without due process of law.

4. Master and Servant—Workmen's Compensation Act—Validity—Delegation of Judicial Power—Board of Awards.

The board of awards created by the Workmen's Compensation Act is not a court and the Act is not invalid as delegating judicial power to it in contravention of the Constitution.

5. Master and Servant—Workmen's Compensation Act—Validity—Right to Appeal to Courts—Denial.

The constitutional right to appeal to the courts for redress of wrongs is not denied by a Workmen's Compensation Act which establishes a board of awards by which the right of claimants to participate in a State insurance fund is determined, where an appeal lies to the courts from its decision, and an injured employee may, in the first instance, waive his claim under the Act and sue in court for his damages.

6. Master and Servant—Workmen's Compensation Act—Validity—Unjust or Arbitrary Classification.

A Workmen's Compensation Act affecting only employers of five or more employees and applicable only to workmen or operatives, is not invalid on the ground that it makes an unjust and arbitrary classification.

Mandamus by the State, on relation of one Wallace D. Yaple, to the State Treasurer of Ohio. Demurrer to petition overruled.

For Relator—Timothy S. Hogan, Atty. Gen., C. D. Laylin, Frank Davis, Jr., J. Harrington Boyd, Wallace D. Yaple, James I. Boulger, D. J. Ryan, J. L. Hampton and George B. Okey.

NOTE.

On the subject of the Constitutionality of the Workmen's Compensation

Acts, see annotation on page 720 of this volume (1 N. C. C. A.), *post*.

7. Master and Servant—Workmen's Compensation Act—Validity—Obligation of Contracts.

Contracts in existence and unexpired at the time a Workmen's Compensation Act is put into operation by an employer cannot be affected or impaired by it.

8. Master and Servant—Workmen's Compensation Act—Validity.

An Act providing for the compensation of workmen, accidentally injured, from a State insurance fund arising from premiums paid by employers and employees, and administered by a State board of awards, does not inaugurate a radical step in government policy beyond the bounds put upon the legislative will.

For Defendant—Lentz, Karns, Linton & Hengst, S. H. Tolles, H. B. Arnold, H. H. McKeahan, M. B. & H. H. Johnson, T. H. Hogsett, Outhwaite, Linn & Thurman, D. N. Postlewaite, Theodore W. Reath, F. M. Rivines and Henry Bannon.

JOHNSON, J. The statute in question provides for the creation of a State liability board of awards, which shall establish a State insurance fund, from premiums paid by employers and employees in the manner provided in the Act. It provides a plan of compensation for injuries, not willfully self-inflicted, resulting from accidents to employees of employers, both of whom have voluntarily contributed to the fund in the proportion of 10 and 90 per cent respectively. It applies only where the employer has five or more operators regularly in the same business or in or about the same establishment. An employer who complies with the Act is relieved from liability to respond in damages at common law, or by statute, for injury or death of an employee who has complied with its provisions, except when the injury arises from the willful act of himself or officer or agent, or from failure to comply with any law or ordinance providing for protection of life and safety of employees, in which event the employees or their representatives have their election between a suit for damages and a claim under the Act. Employers of five or more who do not pay premiums into the fund are deprived in actions against them of the common-law defenses of the fellow-servant rule, the assumption of risk, and of contributory negligence. Where the parties are operating under the Act, the injured employee and his dependents in case of death are compelled to accept compensation from the insurance fund in the manner provided, except in the cases above set forth.

The objections to the validity of the Act are stated by different counsel at the bar, and in their briefs, under various heads. All of them are substantially comprised in the following: First. That it is an unwarranted exercise of the police power and directs the State to use public funds for private purposes. Second. That §§ 20-1 and 21-1 take private property without due process of law in contra-

vention of §§ 15, 16, and 19, art. 1, of the Constitution of Ohio, and the fourteenth amendment to the Constitution of the United States, in that it deprives employers of the defense of assumption of risk, and deprives the employee of part of his wages to be paid to the State insurance fund, of the right to sue for injuries sustained, of recourse to the courts, and of a trial by jury. Third That it deprives parties of the freedom of contract and impairs the obligations of contracts. Fourth. That it makes an unjust and arbitrary classification and does not affect all who are within its reason.

Sections 20-1 and 21-1 are as follows, viz.:

"Sec. 20-1. Any employer who employs five or more workmen or operatives regularly in the same business or in or about the same establishment who shall pay into the State insurance fund the premiums provided by this Act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injuries or death of any such employee, wherever occurring, during the period covered by such premiums, provided that the injured employee has remained in his service with notice that his employer has paid into the State insurance fund the premiums provided by this Act; the continuation in the service of such employer with such notice, shall be deemed a waiver by the employee of his right of action as aforesaid. Each employer paying the premiums provided by this Act into the State insurance fund shall post in conspicuous places about his place or places of business typewritten or written notices stating the fact that he has made such payment; and the same, when so posted, shall constitute sufficient notice to his employees of the fact that he has made such payment; and of any subsequent payments he may make after such notices have been posted.

"Sec. 21-1. All employers who employ five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall not pay into the State insurance fund the premiums provided by this Act, shall be liable to their employees for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employees, and also to the personal representatives of such employees where death results from such injuries and in such action the defendant shall not avail himself or itself of the following common-law defenses: The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence."

The law was passed after a report referred to in the briefs, of a

commission appointed by the Governor, in obedience to a statute passed for that purpose. The report was prepared after an exhaustive research into industrial conditions in many countries, and an examination of laws, which have been passed in the effort to improve such conditions. Substantially, its conclusions are: That the system which has been followed in this country, of dealing with accidents in industrial pursuits, is wholly unsound; that there is an intelligent and widespread public sentiment which calls for its modification and improvement; that the general welfare requires it; that there has been enormous waste under the present system, and that the action for personal injuries by employee against employer no longer furnishes a real and practical remedy, annoys and harasses both, and does not meet the economic and social problem which has resulted from modern industrialism. Conceding the desirability of improvement, of legislative and governmental action, and the good results in other countries which have no written Constitution to limit the legislative power, we in this country have the problem of devising a plan which shall not infringe the fundamental law.

It is apparent, from a contemplation of the whole enactment and its scope and purpose, as well of the participation of the State in its administration, that it must find its validity, if at all, in the police power of the State. There is now (it can be fairly said) general concurrence in the meaning of the term "police power" and as to its extent. Prof. Freund, in his work, says, at § 2: "The term 'police power' has never been circumscribed. It means at the same time a power and function of government, a system of rules and an administrative organization and force." And in § 3, after discussing its nature and aims, he says: "It will reveal the police power not as a fixed quantity, but as the expression of social, economic, and political conditions. As long as these conditions vary, the police power must continue to be elastic, i. e., capable of development." In *State ex rel. Monnett v. Pipe Line Co.*, 61 Ohio St. 520, 56 N. E. 464, as to the constitutionality of the Ohio anti-trust law, it is said: "The definite proposition of counsel upon this point is that, although the Act is the exercise of legislative power, it transcends the provisions of the State and Federal Constitutions which render inviolable the rights of liberty and property, which include the right to make contracts. It would be difficult to place too high an estimate upon these guaranties, and they include the right to make contracts. But it is settled that these guaranties are themselves limited by the public welfare or the exercise of the police power." In *Phillips v. State*, 77 Ohio St.

216, 82 N. E. 1065, it is said: "It is almost an axiom that anything which is reasonable and necessary to secure the peace, safety, morals, and best interests of the commonwealth may be done under the police power; and this implies that private rights exist, subject to the public welfare. These principles are plainly recognized in article 14, § 1, of the Constitution of the United States, and article 1, § 19 of the Constitution of Ohio." The cases of *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, and *Assaira State Bank v. Dolley*, 219 U. S. 121, 31 Sup. Ct. 189, 55 L. Ed. 123, involved the constitutionality of laws enacted by Oklahoma and Kansas, in the exercise of the police power to establish bank depositors' guaranty funds created by levy on each of the banks. Objection was made that the tax was an appropriation of the property of one bank to pay debts of another without due process of law. Mr. Justice Holmes said: "The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. * * * Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. * * * It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518 [17 Sup. Ct. 864, 42 L. Ed. 260]. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." We think it clear that the objects and purposes as above set forth, which the Legislature contemplated in the passage of the law in question, are sufficient to sustain the exercise of the police power, and the participation of the State in the manner provided. Whether the plan adopted is the most appropriate or best calculated to accomplish those objects are matters with which the court is not concerned, and the law should not be held to be invalid unless clearly in violation of some provision of the Constitution.

It is urgently insisted that while the law is apparently permissive and leaves its operation to the election of employers and employees, it really is coercive, and upon this premise much persuasive argument against the validity of the law is based. This is an important question in the case.

An examination of the sections touching the questions made is here necessary. After providing in § 20-1 that an employer who elects

to comply with the Act shall be relieved from liability to the employee at common law, or by statute (except as provided in § 21-2), it is then enacted in § 21-1: "All employers who shall not pay into the insurance fund, * * * shall be liable to their employees for damages, * * * caused by the wrongful act, neglect or default of the employer, his agents," etc. And in such cases the defenses of assumption of risk, fellow servant, and contributory negligence are not available. So that an employer who elects not to come into the plan of insurance may still escape liability if he is not guilty of wrongful act, neglect or default. His liability is not absolute, as in the case of the New York statute hereinafter referred to. And it cannot be said that the withdrawal of the defenses of assumption of risk, fellow servant, and contributory negligence, as against an employer who does not go into this plan, is coercive, for such withdrawal is in harmony with the legislative policy of the State for a number of years past. The law known as the Norris law, passed in 1910, withdrew these defenses in the particulars covered by the law.

As to the employee, if the parties do not elect to operate under the Act, he has his remedy for the neglect, wrongful act, or default of his employer and agents as before the law was passed, and is not subject to the defenses named. If the parties are operating under the Act, the employee contributes to an insurance fund for the benefit of himself or his heirs, and, in case he is injured or killed, he or they will receive the benefit even though his injury or death was caused by his own negligent or wrongful act, not willful. And that is not all. Under § 21-2, if the parties are operating under the Act, and the employee is injured or killed, and the injury arose from the willful act of his employer, his officer or agent, or from failure of the employer or agent to comply with legal requirements, as to safety of employees, then the injured employee or his legal representative has his option to claim under the Act or sue in court for damages. Therefore the only right of action which this statute removes from the employee is the right to sue for *mere negligence* (which is not willful or statutory) of his employer, and it is within common knowledge that this has become in actual practice a most unsubstantial thing.

It is conceded by counsel that the particulars named in § 21-2 are such as form the basis of a large portion of claims for personal injuries. Many employers may elect to remain outside its provisions it would not be strange if many do so. On the other hand, some workmen may feel disposed to do likewise in spite of what would

seem to be to their manifest advantage in securing the benefits of the insurance. However, if there should be such general acceptance of and compliance with the statute as its framers hope for, so as to bring a large part of the labor employed in the industrial enterprises of the State within its influence and operation, that would not demonstrate its coercive character. On the contrary, it would justify the enactment. Naturally time and experience will disclose imperfections and inefficiencies in the plan; but if it should prove to be feasible, and appropriate in a general way, these imperfections can be corrected by the Legislature. On account of the common-law and statutory rights still preserved to the parties by this statute (as we have pointed out) in cases where the election is made to come under its provisions as well as not to do so taken in connection with the advantage to each which the plan contemplates, we cannot say that the statute is coercive. As was said in the Wisconsin case [*Borgins et al. v. Falk Co.*, 147 Wis. 327, 2 N. C. C. A. (Negligence and Compensation Cases Annotated) —, 133 N. W. 209]: "Laws cannot be set aside upon mere conjecture or speculation. The court must be able to say with certainty that an unlawful result will follow." We do not see how any such thing can be said here. Every consideration of prudence and self-interest (things not easily associated with compulsion and coercion) would seem to lead an employee voluntarily to make the contribution and waiver contemplated.

Second. Does this statute take private property without due process of law and deny the guaranties of the Constitution as claimed?

Perhaps no exact definition of "due process of law" has been agreed on. Judge Story defines it in his work on the Constitution (§1935): "The right to be protected in life and liberty and in the acquisition of property under equal and impartial laws, which govern the whole community. This puts the State upon its true foundation, for the establishment and administration of general justice, justice of law, equal and fixed, recognizing individual rights and not impairing them." In *Cooley on Const. Limit.*, § 356, it is said: "Due process of law, in each particular case, means such an exercise of the government, as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the classes of cases to which the one in question belongs."

The case of *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 1 N. C. C. A. (Negligence and Compensation Cases Annotated) 517, 94 N. E. 431, (relied on by some of counsel), involved a statute different in many essentials from the Ohio law. Its controlling feature was that every

employer engaged in any of the classified industries should be liable to a workman for injury arising in the course of the work by a necessary risk inherent in the business whether the employer was at fault or not and whether the employee was at fault or not, except when his fault was willful. The court held the law invalid, as imposing the ordinary risks of a business (which under the common law the employee was held to assume) on the employer. The court states one of the premises on which it proceeds as follows: "When our Constitutions were adopted, it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another." But that rule was not of universal application. At common law one may sustain such relation to the inception of an undertaking that he will be held liable for negligence in the progress of the enterprise, even though he had no part or connection with the negligent act itself which caused the injury. Such for instance, as where the owner of property contracts with an independent contractor to do the work which though entirely lawful, yet has inherent probabilities of harm if negligently performed. The position in the line of causation which employers sustain in modern industrial pursuits is of course the basic fact on which employers' liability laws rest.

As to the right to abolish the defense of assumption of risk, it is enough to say here that the great weight of authority is against the New York position and the position of such of the counsel in this case as insist on that rule. Some of counsel appearing against the validity of this law concede the right to abolish the defenses referred to. The Supreme Courts of Massachusetts, Wisconsin, and Washington have recently held, in cases sustaining the validity of statutes similar to the one here attacked, that it is within the legislative power to abolish the defense referred to. In re Opinion of Justices, 209 Mass. 607, 1 N. C. C. A. (Negligence and Compensation Cases Annotated) 557, 96 N. E. 308; Borgnis v. Falk Co., 147 Wis. 327, 2 N. C. C. A. (Negligence and Compensation Cases Annotated) —, 133 N. W. 209; State ex rel. v. Clausen, (Wash.), 117 Pac. 1101, 2 N. C. C. A. (Negligence and Compensation Cases Annotated) —.

Since the argument of this case the Supreme Court of the United States has decided the case of Mondou v. N. Y., N. H. & H. Ry. Co., [223 U. S. 1, 1 N. C. C. A. (Negligence and Compensation Cases Annotated) *post*], and has sustained the constitutionality of the Employers' Liability Law passed by Congress. The abolition of these rules was urged as an objection to the law. The court says: "Of the objection to these changes it is enough to observe: First. A person has no

property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will * * * of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. *Munn v. Illinois*, 94 U. S. 113, 134 [24 L. Ed. 77]; *Martin v. Pittsburg & L. E. R. R. Co.*, 203 U. S. 284, 294 [27 Sup. Ct. 100, 51 L. Ed. 184]; *The Lottawanna*, 21 Wall. 558, 577 [22 L. Ed. 654]; *Western Union Telegraph Co. v. Commercial Milling Co.*, 218 U. S. 406, 417 [31 Sup. Ct. 59, 54 L. Ed. 1088]."

The recent case of *State v. Boone*, 84 Ohio St. 346, 95 N. E. 924, is cited as indicating limitations of the police power which apply here. The Act involved in that case required the physician in attendance on a case of confinement to investigate and certify without compensation to certain facts which would not naturally come within the knowledge of the attending physician, and as to matters wholly outside the scope of his professional duty. The court held the statute unconstitutional as to physician and midwife because of an unreasonable and arbitrary exercise of the police power. That was the proposition of law decided in that case, and no other proposition was decided. The court was careful to point out in the opinion and also on motion for rehearing that the State might require the physician to report to proper authority facts which would come naturally under his observation, in the line of his duty without compensation. Other matters referred to in the opinion were not included in the syllabus which stated the law decided by the court.

The court remarks that the police power inheres in the sovereignty. foundation "is the right and duty to provide for the common welfare of the governed." Manifestly the reasoning which led to the conclusion in that case that the statute had been passed by an unreasonable exercise of the police power can have no application here.

State ex rel. v. Hubbard, 22 Ohio Cir. Ct. R. 253, affirmed without opinion in 65 Ohio St. 574, 64 N. E. 109, 58 L. R. A. 654, and *State ex rel. v. Guilbert*, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756, involving the validity of statutes creating a teacher's pension fund and the Torren's law to establish an insurance fund for the protection of land titles, concerned laws which were wholly compulsory with no element of choice and were not claimed to have been passed under the police power to cure undesirable public conditions,

but for the private benefit. These cases can therefore have no relation to a plan adopted to promote the general welfare, the contributions to which are made after an election by the parties to participate in the undertaking.

It is urged by counsel opposing this law that the case of *Byers v. Meridian Printing Co.*, 84 Ohio St. 408, 95 N. E. 917, is of conclusive weight condemnatory of the legislation we are examining. In that case it is ruled that an amendment to § 5094, Revised Statutes (changing the presumption of malice and burden of proof in actions for libel where retraction is made on demand, in the manner stated) is unconstitutional. The decision was put on the ground that plaintiff was guaranteed his remedy by due course of law for an injury done in his land, goods, person, or reputation, under art. 1, § 16, Constitution of Ohio. When the injury was done to the reputation of plaintiff by the libel, he was entitled to his constitutional remedy at law; but at the same time he was entitled to demand of the publisher a retraction of the libel. Therefore the Legislature had no right to put him on his election as to two courses both of which he was entitled to follow. The court is careful to declare that it is not disposed to question that a citizen may waive a constitutional right. But being compelled to elect between two rights, both of which a person is entitled to, has no resemblance to waiver. And under the law under investigation here, as already shown, the right of action (for injury by willful act of the employer and for his failure to comply with requirements as to the safety of employees) is still reserved to the employees. So that the only thing withdrawn by this law, and to which withdrawal he consents by his voluntary election to operate under the law, is his right of action for mere negligence, and in place of it he receives the substantial protections and privileges under the State insurance fund.

It is stated in *Butt v. Green*, 29 Ohio St. 670, that persons may expressly or impliedly waive either constitutional or statutory provisions intended for their benefit, and, as above shown, the court in the *Byers* case state that it is not disposed to question that one may waive a constitutional right.

We think that in such a case as is presented here, in which the State itself has undertaken a great enterprise in the interest of the general good, and in the exercise of its police power, and presents to its citizens the option to join in the undertaking and receive its protection and benefit, on a right of action being withdrawn by the Legislature which experience has shown to be difficult of practical enforcement, while preserving the valuable and substantial kindred rights of action, it cannot be said that in such withdrawal there is

a violation of the Constitution in the respects claimed.

But it is insisted that the Act delegates judicial power to the board of awards, and denies recourse to the courts and trial by jury.

Of course, if the board is a court, there is an end of the whole matter. The statute would be unconstitutional; for if the board is a court, it has not been created in accordance with the manner provided by the Constitution. We do not consider the board of awards a court, or invested with judicial power within the meaning of the Constitution. It is created by the Act purely as an administrative agency to bring into being and to administer the insurance fund, and the fact that it is empowered to classify persons who come under the law and to ascertain facts as to the application of the fund does not vest it with judicial power within the constitutional sense. Under our system the executive department of the government has many boards to assist in the administration of its affairs.

In *State ex rel. v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228, it is said: "What is judicial power cannot be brought within the ring-fence of a definition. It is undoubtedly power to hear and determine, but this is not peculiar to the judicial office. Many of the acts of the administrative and executive officers involve the exercise of the same power." The court then shows that many boards hear and determine questions affecting private as well as public rights, and quotes with approval from *State ex rel. v. Harmon*, 31 Ohio St. 250: "The authority to ascertain facts, and apply the law to the facts when ascertained pertains as well to other departments of government as to the judiciary." These principles were applied in *France v. State*, 57 Ohio St. 1, 47 N. E. 1041, in which case the court remark that the case of *State ex rel. v. Guilbert*, 56 Ohio St. 576, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756, forms no exception, for the powers of the recorder under the statute there in question were essentially those which properly belong to a court.

Does the law deny recourse to the courts and trial by jury? How does it affect an injured employee where the parties are operating under the Act?

In *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 232, 46 N. E. 577, 49 L. R. A. 381, 60 Am. St. Rep. 745, which was a suit by the beneficiaries of a member of the relief department of the railroad, the company answered setting up a rule which provided that the decision of the relief department should be final. The court say: "The right to appeal to the courts for redress of wrongs is one of those rights which in its nature under our Constitution is inalienable and cannot be thrown off or bargained away." But the court shows that

parties may contract to submit the fixing of facts to some nonjudicial tribunal and say: "In insurance and other like cases, where the ultimate question is the payment of a certain sum of money, certain facts may be fixed by a person selected for that purpose in the contract; but the ultimate question as to whether the money shall be paid or not may be litigated in the courts, and a stipulation to the contrary is void." So under that rule the parties may conclusively bind themselves in advance to submit questions of amount, etc., to some tribunal other than a court; but the ultimate question of actual liability cannot be removed from the courts.

Now, in this statute, § 36 is as follows: "Sec. 36. The board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decisions therein shall be final. Provided, however, in case the final action of such board denies the right of the claimant to participate at all in such fund * * * upon any * * * ground going to the basis of the claimant's right, then the claimant within thirty (30) days after the notice of the final action of such board may, by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. In such a proceeding, the prosecuting attorney of the county, without additional compensation, shall represent the State liability boards of awards, and he shall be notified by the clerk forthwith of the filing of such appeal. Within thirty days after filing his appeal, the appellant shall file a petition in the ordinary form against such board as defendant." Therefore, if the board denies the claimant's right to participate in the fund on any ground going to the basis of his claim, he may by filing an appeal and petition in the ordinary form be entitled to trial by jury; the case proceeding as any other suit.

It is not an appeal in the sense of appealing from one court to another, but is really the beginning of an original suit. As to this it must be remembered that the whole proceeding is with and against the boards of awards. His claim is not against the employer. There is no dispute between them. His claim is for the benefits of the insurance fund. The board of awards inquire into the matters pointed out in the statute, and in case of dispute as to whether there is any ultimate right to "participate at all in such fund" he has his recourse to the courts. But he is not confined to that method of proceeding. If he claims that the injury was caused by the willful act of the employer or officer or agent or from failure to comply with legal requirements as to the safety of employees, etc., he may waive his claim under the Act and sue in court for his damages. But in his

petition in such case he could not claim damages for mere negligence; he having elected to waive that cause of action, having elected, as it were, to assume the risk of his employer's *mere* neglect in return for the benefits and protection to himself and his heirs afforded by the terms of the Act.

Another objection that is urged against this statute is that it makes an unjust and arbitrary classification and does not affect all who are within its reason as required by § 26, art. 2, of Constitution of Ohio. Under the law only employers of five or more are affected by it.

Spear, J., in *Cincinnati v. Steinkamp*, 54 Ohio St. 295, 43 N. E. 492, remarked: "In order to be general and uniform in operation, it is not necessary that the law should operate upon every person in the State, nor in every locality; it is sufficient, the authorities concede in holding, if it operates upon every person brought within the relation and circumstances provided for, and in every locality where the condition exists." To same effect are *Platt v. Craig et al.*, 66 Ohio St. 75, 63 N. E. 594; *Gentsch v. State ex rel.*, 71 Ohio St. 151, 72 N. E. 900; *Railroad Co. v. Horsterman*, 72 Ohio St. 107, 73 N. E. 1075.

We think the classification is reasonable and proper. In the nature of the case the risks of any regular employment are less and the opportunity for avoiding them better where an employee is one of four than when the number is larger. As was said by Winslow, C. J., in *Borgnis v. Falk Co.*, *supra*, [147 Wis. 327, 2 N. C. C. A. (Negligence and Compensation Cases Annotated) —, 133 N. W. 209]: "The difference in the situation is not merely fanciful; it is real." *St. Louis Consol. Coal Co. v. Illinois*, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872, is a case in which a classification was made under somewhat similar manner, and was upheld. Nor do we think it an objection that the law applies only to workmen and operatives and not to all others. This classification brings within the law all employees within its reason.

As to the suggestion that this statute impairs the obligation of contracts, it is sufficient to say that it can, of course, not affect contracts in existence and unexpired at the time it is put into operation by the employer.

It is suggested that this legislation marks a radical step in our government policy not contemplated by the Constitution, and which it is the duty of the court to condemn. But it creates no new right, or new remedy for wrong done. It is an effort to in some degree answer the requirements of conditions which have come in an age of invention and momentous change. The courts of the country, while firmly resisting encroachment on the Constitutions in the past, have yet found in their ample limits sufficient to enable us to meet the emerg-

encies and needs of our development, and we do not find that this statute goes beyond the bounds put upon the legislative will.

The demurrer to the petition will be overruled, and the writ of mandamus awarded. Demurrer overruled.

SPEAR, PRICE, and DONAHUE, JJ., concur.

GREIF, ADM'X v. BUFFALO, LOCKPORT & ROCHESTER RY. CO.

[COURT OF APPEALS OF NEW YORK, APRIL 9, 1912.]

205 N. Y. 239.

1. Master and Servant—Action—Statute—Notice of Injuries—Sufficiency.

The notice required to be served, under section 201 of the Labor Law, which provides that no action for injuries shall be maintained unless notice of the time, place, and cause of the injury is given to the employer, is sufficient, where it states as follows:

"You will please take notice, that on the 19th day of January, 1909, about 11 o'clock p. m., while I was in your employ as watchman and helper at your car barn and repair shop, situate in the town of Gates, west of the city of Rochester, I was injured by falling from the top of a car which was at the time standing in said barn for repairs. The said car was brought into the barn with a damaged trolley pole, and the repairs consisted in taking out that trolley pole and inserting another. The car was run into the barn on a track having a trolley wire over it, and I was sent to the top of the car to make the change of trolley poles. The power, or electric current, is supposed to be turned off from the trolley wire in said barn and from said car at such a time when repairs are taking place. After the old trolley pole was removed, and while I was standing on the top of the car, a new trolley pole was handed to me, and as I attempted to insert it in the socket it touched the trolley wire and I received a shock of electricity, which threw me to the ground, injuring my spine so that I am paralyzed and helpless."

2. Master and Servant—Action for Injury—Superintendence—Question for Jury.

In an action to recover for the death of a servant employed by an electric railway line, based upon a statute which gives a right of action against an employer for injuries to a servant on account of the negligence of any person intrusted with the duty of superintendence, or in the absence of such superintendent, on account of the negligence of any other person acting in that capacity with the consent of the employer, it is a question for the jury as to whether a fellow employee, in the absence of the superintendent, was acting in the capacity of superintendent with the employer's consent.

3. Master and Servant—Shock—Action for Injury—Question for Jury.

In an action to recover damages for the death of a servant who received injuries from which he subsequently died, caused by falling from the top of a trolley car on which he was assisting another in replacing a new pole, after the new pole had come into contact with the trolley wire which was charged with electricity, the question as to the cause of the shock which produced the accident was for the jury.

Appeal by plaintiff from a judgment of the Appellate Division (Greif v. Buffalo, Lockport & Rochester R. Co., 145 App. Div. 910; 139 N. Y. Supp. 1125) overruling plaintiff's exceptions ordered to be heard in the first instance at the Appellate Division, and directing a

NOTE.

On the subject of the Doctrine as to Superior Servants, see note in 3 Am. Neg. Rep. 109.

And on the subject of Accidents to Servants Caused by Contact with

Electric Wires, see Note in 12 Am. Neg. Rep. 322.

And on the subject of Negligence of Alleged Representative of Master Causing Injury, see Note in 13 Am. Neg. Rep. 444.

4. Master and Servant—Shock—Action for Injury—Contributory Negligence.

In an action to recover damages for the death of a servant who received injuries from which he subsequently died, caused by falling from the top of a trolley car on which he was assisting another in replacing a new pole, after the new pole had come into contact with a charged trolley wire, the question as to the contributory negligence of the servant is for the jury.

5. Master and Servant—Action for Injury—Contributory Negligence—Statute.

Chapter 352, Laws 1910, in amendment of § 202a of the Labor Law, which relieves the plaintiff in an action for injuries alleged to have been caused by negligence, from the burden of showing want of contributory negligence and making contributory negligence a matter of defense which must be pleaded and proved by defendant, is not retroactive in effect.

judgment in favor of defendant upon a nonsuit granted on the trial of an action brought to recover damages for alleged negligent death of plaintiff's intestate which resulted from a fall from the top of a trolley car on which he was helping to replace a new trolley pole. **Reversed.**

For appellant—Wm. F. Lynn.

For respondent—Ernest I. Edgcomb.

HAIGHT, J. This action was brought under the Employer's Liability Act (Consol. Laws 1909, c. 31, §§ 200-204) to recover damages arising from the death of plaintiff's husband, Frederick Greif, an employee of the defendant, resulting from a fall from the top of one of defendant's cars on the 19th day of January, 1909. The plaintiff's intestate entered the employ of the defendant in September, 1908, and for several weeks prior to the accident he had been assigned to duty as night watchman, car cleaner, janitor of the offices, and occasional helper of Otis J. Carr, the car inspector, whenever he needed assistance in making minor or temporary repairs. The accident happened at the defendant's car barn in the town of Gates, in which the cars not in use were stored during the night and were cleaned, inspected, and, if needed, minor temporary repairs were made. For the purpose of running cars out and into the barn a trolley wire had been provided, guarded by an overhead board 12 or 14 inches wide, running lengthwise of the wire with pieces on either side forming an inverted trough. Between 11 and 12 o'clock on the evening of the accident a car was run into the barn, having a trolley pole on each end of the car, one of which was bent so as to require a new pole. Carr, the inspector, called decedent's attention to the fact and said that they would have to put in a new pole and told him to go upon the roof of the car and take the old pole out while he went to get a new one. Thereupon decedent climbed to the top of the car, took the old pole out, and threw it to the ground. Carr returned with the new pole, placed it against the car, climbed to the top, and pulled

the pole up after him and laid it across the board on top of the trolley wire and told decedent to hold it. Carr then turned to light a cigarette that he was smoking, and as he again turned to look at decedent he saw him in the act of falling backwards from the top of the car, carrying the pole with him. In striking upon the ground his spine was injured, producing paralysis, which resulted in his death on the 16th day of March thereafter. After the decedent fell it was discovered that his hands were burned and blistered and that there was another burn across his neck.

Prather was the master mechanic of the defendant in charge of the barn and repair shop and employed Carr as his night inspector, whose duties were to take charge of the barn during the night, look after the cleaning of the cars and make minor temporary repairs. At the entrance of the barn there was a switch, by which the electricity could be turned on or off from the trolley wire, which was also in charge of Carr. The master mechanic also employed the decedent and took him to the barn and told Carr that he would help him nights in cleaning and making repairs. Prather, the master mechanic, was not at the barn nights, but during that time Carr was left in charge. On several occasions he had called upon the decedent to help him clean trolley bases, and on each of those occasions the electricity was turned off before doing the work. On the night in question, however, the electricity had not been turned off from the trolley wire, and the car was what was known as a "live car." Neither Carr nor the master mechanic had ever given decedent any instructions in regard to danger from electricity.

It is now contended that the notice given to the employer of the intention to bring an action under the Employer's Liability Act was defective and insufficient in law; that it failed to state that the plaintiff's intestate exercised due care; that it did not sufficiently state the cause of the injury; and that it did not state the particulars in which the defendant was negligent. The notice was given by the decedent in his lifetime, was addressed to the defendant, and stated "You will please take notice, that on the 19th day of January, 1909, about 11 o'clock p. m., while I was in your employ as watchman and helper at your car barn and repair shop, situate in the town of Gates, west of the city of Rochester, I was injured by falling from the top of a car which was at the time standing in said barn for repairs. The said car was brought into the barn with a damaged trolley pole, and the repairs consisted in taking out that trolley pole and inserting another. The car was run into the barn on a track having a trolley wire over it, and I was sent to the top of the car to make the change

of trolley poles. The power, or electric current, is supposed to be turned off from the trolley wire in said barn and from said car at such a time when repairs are taking place. After the old trolley pole was removed, and while I was standing on top of the car, a new trolley pole was handed to me, and as I attempted to insert it in the socket it touched the trolley wire and I received a shock of electricity, which threw me to the ground, injuring my spine so that I am paralyzed and helpless."

The statute provides that "no action for recovery of compensation for injury or death under this article shall be maintained unless notice of the time, place and cause of the injury is given to the employer." Labor Law (Consol. Laws 1909, c. 31) § 201.

Upon referring to the notice it appears that each of the requirements of the statute has been fully complied with, the time and place are given, and that the fall from the car was caused from the shock of electricity which the decedent received while he was attempting to insert the new pole in the socket, and that the fall produced the injury to his spine and paralysis. The provisions of such notice have previously been under consideration in this court, and under our recent decisions we entertain the view that this notice was sufficient. *Bertolami v. United E. & C. Co.*, 198 N. Y. 71, 91 N. E. 267; *Martin v. Walker & Williams Mfg. Co.*, 198 N. Y. 324, 329, 91 N. E. 798; *Smith v. Milliken Bros.*, 200 N. Y. 21, 24, 93 N. E. 184.

Under the provisions of the statute it is provided that when personal injury is received by an employee, who is himself in the exercise of due care and diligence, by reason of the negligence of any person in the service of the employer intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, or in the absence of such superintendent of any person acting as superintendent with the authority or consent of such employer, an action may be maintained against such employer for the damages sustained, etc. In this case the evidence tends to show that Prather, the master mechanic, was in charge of the car barn and shop, who employed the workmen therein; that they worked under his order and direction; that he employed Carr, the inspector, as well as Greif, the plaintiff's intestate; that during nights Carr was placed in charge of the barn and shop in the absence of the master mechanic; and that Greif was performing the duties of night watchman, cleaner, etc., with directions to assist Carr when he so required. This evidence we regard as sufficient to raise a question of fact for the jury for its determination as to whether or not Carr, during the nights in the absence of the master mechanic, the superintendent, was acting as such superin-

tendent with the authority or consent of the employer, and if the jury should find that he was so acting at the time of the accident then his negligence, if any, would become the negligence of the master and not that of a coemployee.

The complaint charges numerous acts of negligence on the part of the defendant, among which are the charges that the plaintiff's intestate was unfamiliar with electricity and electrical apparatuses and that neither the master mechanic, nor Carr, had instructed him with reference to the dangers of the work, and that Carr had neglected on the occasion in question to turn off the electricity from the trolley wire before attempting to replace the new pole. If, therefore, Carr was acting as superintendent at the time, and the injuries received by Greif were the result of Carr's negligence, it would follow that such injuries resulted from the negligence of the defendant.

The courts below evidently entertained the view that the plaintiff had failed to show the cause of the accident to Greif and his freedom from contributory negligence; the contention being that the evidence does not show how he received the shock, and that if it was received in the manner stated in Greif's notice it was owing to his own voluntary act, for which the defendant was not responsible. It must be conceded that the evidence upon this branch of the case is somewhat meager. Greif being dead, the only witness who could testify upon the subject was Carr. He, as we have seen, called Greif to assist him in putting in a new trolley pole upon the top of the car and had told Greif to climb onto the top of the car and take the old pole out. This Greif had done and thrown the old pole onto the ground. Carr had arrived with the new pole and had himself climbed onto the top of the car and laid the pole across the board that was over the trolley wire, directing Greif to hold it while Carr lighted a cigarette. The next thing that Carr saw was Greif falling backwards from the car with the trolley pole in his hands, and when Greif was picked up from the ground it was found that his hands and neck were burned and that they were not burned before the accident. It is apparent, therefore, that Greif had raised the pole from the trolley board and had it in his hands. He was there to help Carr insert the new pole into the trolley socket on top of the car, the place from which he had taken the old pole. The pole was of metal, the car was a live car. It had two trolley poles, one on either end. It had been run into the barn by means of the other pole; the pole that was removed having become bent and useless. It does not appear that the pole from which the car had been run into the barn had been pulled down or removed from the trolley wire. The trolley wire was charged with electricity;

it not having been turned off by the switch provided for that purpose. Of course, it appears from the notice that Greif had signed before his death that he had taken the pole and inserted it in the socket and that the other end of the pole came in contact with the trolley wire, which formed a circuit and caused the shock; but we cannot consider this statement as evidence in the case. The fact, however, exists that he did receive a shock, or else his hands would not have been burned, and that that shock necessarily must have been produced by bringing the two ends of the pole which he had in his hands in contact with the trolley wire and some part of the metal upon the car. But it is contended that, if he took the pole from the top of the trolley board, he did so voluntarily and not by directions of Carr, who merely told him to hold it. But he was there to assist Carr in putting in the new pole, which he was holding by direction of Carr. He had just removed the old pole and might well have understood that the new pole was handed to him to insert in the place from which he had removed the old pole. On every other occasion on which he had been called upon to work upon the car, cleaning the trolley car, the electricity had been turned off from the trolley wire, and he had not been advised that it had not on this occasion. We are therefore of the opinion that it cannot be held as a matter of law that Greif was guilty of contributory negligence, nor that there was such a failure on the part of the plaintiff to prove the cause of the shock which produced the accident as to justify a nonsuit.

The conclusion reached by us is independent of the amendment of the Labor Law, known as section 202a, added thereto by chapter 352 of the Laws of 1910, which relieves the plaintiff from showing want of contributory negligence in actions for personal injuries, and makes it a defense to be pleaded and proved by the defendant. But inasmuch as the question may be again raised upon the new trial, we have thought it wise to state that we do not understand the provisions of that Act to be retroactive.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

CULLEN, C. J. I vote for the reversal of the judgment below and concur in the opinion of Judge HAIGHT, so far as relates to the alleged contributory negligence of plaintiff's intestate, and without considering the question whether Otis J. Carr, the car inspector, was a person whose sole or principal duties were that of superintendence within the statute, I am of opinion that the evidence presented a question of defendant's liability at common law to be determined by

the jury. If Carr had, on this occasion only, or on other isolated occasions, failed to cut off the electric current when he called on deceased to go to the top of the car and assist him, it would be the negligence of a fellow servant in a detail of the work unless Carr was a superintendent, within the Employer's Liability Act. But Carr himself testifies that he was not accustomed to turn off the power when a change was to be made of the trolley pole. I think the jury might find that this was a negligent manner of conducting the work. The learned counsel for respondent contends that "it is impossible to see how deceased could have received any shock." Nevertheless, I think it is certain that the deceased did receive an electric shock. The burns proved that conclusively. If the state of knowledge was such that a person could receive a shock in the position that the deceased was, while the experts were unable to determine how it was possible that the person should receive a shock, the jury might very well find that it was an unsafe and negligent manner of conducting the work not to cut off the electric current, which could have been readily done. For the adoption of an unsafe and negligent method of conducting the work the defendant would be liable. In *Doing v. N. Y., Ontario & Western Ry. Co.*, 151 N. Y. 579, 583, 1 Am. Neg. Rep. 335, 337, 45 N. E. 1028, it was said: "We will assume then, what cannot be questioned, that the workmen were doing the defendant's work in a dangerous and reckless manner. But these workmen were doing nothing but what, according to the testimony, they had been doing for years before. If the defendant permitted its employees to carry on its operations upon those three tracks outside the shop in such a manner as to endanger the lives of those inside, who could not protect themselves, it failed to discharge to the deceased the duty which the law imposed upon it of furnishing him a reasonably safe place to do his work." This was quoted with approval in *Dowd v. N. Y., Ontario & W. R. Co.*, 170 N. Y. 459, 20 Am. Neg. Rep. 680n, 63 N. E. 541. It was said by the court in *O'Brien v. Buffalo Furnace Co.*, 183 N. Y. 317, 321, 19 Am. Neg. Rep. 422, 425, 76 N. E. 161, 162: "It is the duty of the master to use reasonable care to so conduct his business as not to subject servants to unnecessary danger in the prosecution of their work." In this case the jury might find that this duty had not been performed.

VANN and CHASE, JJ., concur with HAIGHT, J. COLLINS, J., concurs with CULLEN, C. J. WILLARD BARTLETT, J., concurs with HAIGHT, J., and CULLEN, C. J. HISCOCK, J., not sitting.

Judgment reversed, etc.

WARNER v. COUCHMAN.*

[COURT OF APPEAL, KINGS BENCH DIVISION, DECEMBER 3, 1910.]

L. R. [1911] 1 K. B. 351, 80 L. J. K. B. 526.

Master and Servant—Workmen's Compensation Act—Frostbite—Injury in Course of Employment.

The employment of a journeyman baker to drive a cart for the purpose of delivering loaves of bread and receive payment therefor from his master's customers, does not expose the servant to any peculiar danger from cold, beyond that to which a large section of the population whose occupation is out of doors is ordinarily exposed, so as to entitle him to claim compensation under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58) for injury to his hand caused by frostbite.

Appeal from a decision of the Judge of the Tenterden County Court. in an action for compensation under the Workmen's Compensation Act for injury caused by frostbite. Appeal dismissed.

For appellant—Messrs. Atkin, K. C., and Mould.

For respondent—Messrs. Hemmerde, K. C., and Addington Willis.

STATEMENT OF FACTS: The applicant was a journeyman baker, whose duty it was to drive a cart containing his master's loaves

*The case of **WARNER v. COUCHMAN**, L. R. [1911] 1 K. B. 351, (the case at bar), was carried to the House of Lords where decision, affirming that of the Court of Appeal, was rendered on November 10, 1911. The appeal was heard before the LORD CHANCELLOR (EARL LOREBUEN), LORD ATKINSON, LORD SHAW and LORD MERSEY. It was held that a journeyman baker who in his rounds delivered bread to his master's customers on a cold day and in receiving money and giving change contracted a chill, followed by œdema, which disabled him for a time, was not injured "by accident arising out of his employment," and was not entitled to compensation under the Workmen's Compensation Act. See **WARNER v. COUCHMAN**, L. R. [1912] App. Cas. [H. L. Eng.] 35, 1 Workm. Comp. Cas. [1912] 28, aff'g L. R. [1911] 1 K. B. 351, 80 L. J. K. B. 526.

NOTE.

For a collection of Cases based upon the **English Employers' Liability Act, 1880** (43 & 44 Vict. c. 42), see 1 Am. Neg. Rep. 616, 6 Am. Neg. Rep. 273, and 9 Am. Neg. Rep. 500.

And for Cases under the same statute (**English Employers' Liability Act, 1880**) see Vols. 13-16 Am. Neg. Cas., where notes of numerous decisions are appended to the **Master and Servant Cases** reported in those volumes.

And for the **English Employers' Liability Act of 1880**, the **Workmen's Compensation Act of 1897**, the **Workmen's Compensation Act of 1900**, and **Employers' Liability Acts of several English Colonies**, see 13 Am. Neg. Cas. 865-874, where the said statutes are reported.

and to obtain payment from purchasers of loaves. On December 8, 1909, which was a very cold day, with rain and sleet at intervals, his right hand became very cold and began to ache. The hand the following day began to swell. Some doctors attributed it to gout, but others, including the medical referee, held that it was caused by something in the nature of a frostbite, sustained by the applicant when delivering bread on December 8. He was still unable to resume his former work.

COZENS-HARDY, M. R. This is an appeal by a workman whose claim to compensation has been disallowed by the County Court Judge. The facts are simple and are not really in dispute.

In order to maintain his claim it is necessary for the applicant to prove that there was a personal injury—first, by “accident” arising, secondly, “out of,” and, thirdly, “in the course of” the employment. That the injury was received “in the course of” the employment is clear, but it is contended that there was no “accident,” and that the injury did not arise “out of” the employment.

I feel considerable doubt whether there was an accident within the meaning attributed to that word by this Court and the House of Lords. But I assume this point in favor of the applicant. It remains to consider the words “out of.” If I may venture to quote my own words in *Craske v. Wigan*, 2 K. B. 635 (1909) where a cockchafer frightened a lady’s maid sitting at an open window, with the result that her eye was injured: “It is not enough for the applicant to say ‘The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.’ He must go further and must say ‘The accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some peculiar danger.’ ” Can that be said in the present case? I am unable to see that there was any peculiar danger to which the applicant was exposed, beyond that to which that large section of the population who are drivers of vehicles, or who are otherwise engaged as out-of-door laborers are exposed.

The case of *Andrew v. Failsworth Industrial Society*, 2 K. B. 32, (1904) upon which the applicant mainly relied, has, I think, been somewhat misunderstood. In that case it was found as a fact by the County Court Judge that the man, who was working on a scaffold at a considerable height, was exposed to more than the normal risk of being struck by lightning, and Lord Collins, then Master of the Rolls, said: “If there is under particular circumstances in a partic-

ular vocation something appreciably and substantially beyond the ordinary normal risk, which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that the extra danger to which the man is exposed is something arising out of his employment." And this Court declined to interfere with the award. On the other hand, the Court of Appeal in Ireland in *Kelly v. Kerry County Council*, 42 Ir. L. T. 23, held that a workman employed on a road, who was killed by lightning, was not entitled to compensation, on the ground that the accident did not arise out of his employment. Now, in the present case the County Court Judge says that there was nothing in the nature of the applicant's employment which exposed him to more than the ordinary risk of cold to which any person working in the open air was exposed on that day. He adds that one fact only was relied on—namely, that he had to take off his right-hand glove in order to give change, and that this, though probably convenient, was not necessary. In the face of this finding of fact, with which we cannot interfere, and which, so far as I can gather from the evidence, was perfectly correct, I think it is impossible for us to reverse the decision of the learned County Court Judge. In my opinion the appeal fails, and should be dismissed with costs.

FLETCHER MOULTON, L. J. The applicant in this case is a journeyman baker. Part of his duties was to go around to the customers delivering bread from his master's cart, taking payment for the same, and giving receipts. On December 8, 1909, while engaged in this occupation, his right hand became seriously affected. There can be no doubt that it was a direct consequence of exposure. The day was very cold, and in my opinion the facts of the case show that it must have been exceptionally so. He was obliged continually to remove his right glove from his right hand for the purpose of fulfilling his duties. The injury to the hand proved to be very serious, bringing on œdema of a persistent character, and ended with wasting of the arm. The medical evidence leaves it clear that it was the consequence of the action of the extreme cold on the capillaries of the hand and the sheaths of the muscles. The County Court Judge, who was assisted by a medical referee, has held that "the injury to the applicant's hand was caused by something in the nature of a frostbite sustained when delivering bread on December 8;" and not only is there evidence to support this finding, but I do not see how he properly could have found otherwise. The question was raised as to whether the injury was partly caused by a tendency to gout.

The medical and other evidence does not support this suggestion, and there is no finding to that effect. But, apart from this, the question whether the man had or had not a tendency to gout is to my mind immaterial to the issue in this case, for there is no doubt that the cold was the immediate and proximate cause of the injury, and the decisions have established that in such a case the fact there was an inherent weakness of constitution in the workman does not take away his right to compensation for the injury. The applicant is still unable to follow his avocation from the effects of the injury, and the County Court Judge has provisionally found the amount of compensation to which he is entitled if his claim be held to be within the Act.

Two points have been raised on behalf of the respondent—First, that the injury was not an “accident” within the meaning of the Act; and secondly, that it did not arise “out of” the employment. The learned County Court Judge decided against the applicant on the latter of these two points, but gave no formal decision on the other. In considering the question whether it was an accident within the meaning of the Act, we are not confronted with the difficulty which was dealt within this Court in the case of *Eke v. Hart-Dyke*, 2 K. B. 677 (1910). The applicant can indicate the day, time, circumstances, and place in which it occurred, so that it bears no similarity to an industrial disease. That being so, we are in my opinion concluded by authority. The *dictum* of Lord McLaren in the Scotch case of *Stewart v. Wilsons & Clyde Coal Co.*, 5 Fraser, 120 (1902), has more than once been approved of in the House of Lords. It is as follows: “If a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in, this is accidental injury in the sense of the statute.” Every word of this *dictum* applies to the present case. The applicant undoubtedly sustained a physiological injury which was the direct result of the work he was engaged in, and he sustained it in the reasonable performance of his duties, for the facts of the case do not justify any suggestion that he did not protect himself as well as he was practically able to do. But, apart from this *dictum*, which is one of such authority as practically to bind this court, the decided cases are to my mind conclusive on this point. I need only refer to the well-known case of *Morgan v. “Zenaida” Steamship*, 25 Law T. R. 446 (1909), where a man engaged in painting a ship in the tropics, who was thereby exposed to the heat of the sun to a greater extent than he otherwise would have been, and who died from the effects of sun-stroke, was held by this court to have died from an accident within the meaning of the Act. I can see no distinction between the effects

of heat and cold in a matter of this kind, provided that in both cases the excess of exposure is due to the circumstances of the employment.

There remains the question whether this accident arose "out of" the employment. I am obliged to confess—and I do it with all humility—that I cannot see that this admits of doubt. The man's employment required him to go his rounds on this bitterly cold day and deliver the bread to the customers and do all the acts necessary thereto. This involved exposure of the right hand, and it was this exposure which brought on the frostbite. The severity of the cold to which he was thus compelled by his employer to expose himself is shown by the nature of the injury, inasmuch as such injuries from cold are rare in this country, though common enough in northern or continental climates; and it is obvious that but for the requirements of his employment that he could have protected himself from such severe cold, either by not going out on rounds such as he was required to make or by properly protecting his hand from the cold. The direct connection between the exposure necessitated by his employment and the injury is further shown by the fact that it was only the hand so exposed that suffered. I confess that I cannot picture a more typical case of an accident "arising out of" the employment.

The judgment of the learned Judge of the County Court shows that he thought himself permitted, and even bound to compare the man's employment with other employments in order to ascertain whether the accident arose out of the applicant's employment. To my mind this is *falsa demonstratio*. The law does not say "arising out of his employment and out of that employment only." Other employments have nothing whatever to do with the question. A shepherd who has to bring in his sheep in a snowstorm, and suffers frostbite and loses his life thereby, is the victim of an accident arising out of his employment none the less because a railway guard or a night watchman or a postillion might be equally exposed to the weather. The comparison of one employment with another is to my mind wholly illegitimate. But when we deal with the effect of natural causes affecting a considerable area, such as severe weather, we are entitled and bound to consider whether the accident arose out of the employment or was merely a consequence of the severity of the weather to which persons in the locality as such and, whether so employed or not, were equally liable. If it is the latter, it does not arise "out of the employment," because the man is not specially affected by the severity of the weather by reason of his employment. The true issue could not better be expressed than by the Irish Court

of Appeal in *Kelly v. Kerry County Council*, 42 Ir. L. T. 23, in dealing with the question of the death by lightning of a man working on the roads. They found that the accident did not arise out of his employment because there was no evidence that in following his employment he ran any greater risk of being struck by lightning than any other person who was in the area of the storm. This was a sound view by reason of the fact that lightning is indiscriminate in its action, and persons at home or abroad, at work or unemployed, run substantially equal dangers. But when a case arose of a man who by reason of his employment was exposed to the danger of lightning to a greater degree than other persons within the area of the storm, this Court in *Andrew v. Failsworth Industrial Society*, 2 K. B. 32 (1904), held that the accident arose out of the employment. It would have puzzled any scientific man to say how much the risk was increased, or whether a woodman or a worker on electric lines or many other kinds of workmen ran an equal risk; but the Court rightly abstained from considering such questions. The case of extreme heat or extreme cold is similar to that of such a natural agency as lightning except that it is easier, as in this case, to show the direct connection between the accident and the employment. But the rule is the same. If the employment brings with it greater exposure, and injury results, that injury arises out of the employment.

For these reasons I am of the opinion that the appeal should be allowed with costs here and in the Court below. It would not be necessary to send the case back, inasmuch as the learned Judge has made a finding as to the amount of compensation if the applicant be entitled to it, as in my opinion he is.

FARWELL, L. J. I agree with the judgment of the Master of the Rolls and not with that of Lord Justice Fletcher Moulton. I am of the opinion that the County Court Judge was right. I assume, as he did, without expressing any opinion on the point, that the frost-bite was an "accident," and I agree with him that although it occurred "in the course of," it did not "arise out of" the employment. I take the test as stated by Lord Collins in *Andrew v. Failsworth Industrial Society*, 2 K. B. 32 (1904); "Was the man exposed to something more than the normal risk, which everybody, so to speak, incurs at any time and at any place," when driving in an open trap on a very cold day with rain and sleet at intervals? I can see none. The squire in his dog cart, the farmer in his gig, the butcher, the grocer, and the carter in their carts, were all in just the same position of exposure. If the injury had been caused by lightning, as in *Andrew v. Fails-*

worth Industrial Society, *supra*, the case would have been clear, and I see no more abnormality of exposure to cold than to lightning. The County Court Judge has found as a fact there was nothing in the workman's employment that exposed him to anything more than the ordinary risks, unless the necessity of taking off his right-hand glove from time to time to give change or make entries was sufficient, and he held that it was not. I agree with him and with the reasoning generally of his excellent judgment.

Appeal dismissed.

JENKINS v. MONTGOMERY.

[SUPREME COURT OF APPEALS, WEST VIRGINIA, NOVEMBER 21, 1911.]

69 W. Va. 795.

1. Damages—Averment—Ad Damnum Clause.

A declaration in an action, even though sounding in damages, is not demurrable because it does not state the amount of damages claimed in the form of an averment. It is sufficient if it appear in any part of the declaration. The *ad damnum* clause, while consistent with good form in pleading, is not indispensable.

2. Municipal Corporations—Digging in Street—Nuisance.

The opening of a ditch in a public street for the purpose of laying a pipe to connect a dwelling with the water main is not *per se* a nuisance, and does not make the owner of the house liable to a person injured by falling into the ditch, unless such owner has been guilty of negligence.

3. Master and Servant—Streets—Laying Pipe—Independent Contractor.

If the owner of a house let the work of opening the ditch and laying the pipe to an independent contractor, and such contractor causes the ditch to be dug, and to be left open and unguarded, and a traveler upon the street falls into it in the nighttime and is injured, without fault on his part, such independent contractor is liable.

4. Master and Servant—Liability to Others.

The master is liable for the negligence of his servant in the performance of a duty to the master within the scope of the servant's employment.

5. Trial—Instructions—Construction.

An instruction which deals only with matters relating to the *quantum* of damages is not erroneous because it assumes right of recovery, provided another instruction has been given properly instructing the jury in regard to the essential facts constituting such right of recovery. In such case it is proper to consider the two instructions together.

Error to the Circuit Court of Fayette County, to review a judgment in favor of plaintiff rendered in an action brought to recover for injuries caused by falling into an open ditch. Modified and affirmed.

For plaintiff in error—V. C. Champe, and Osenton, McPeak & Horan.

For defendant in error—Love & Anderson.

NOTE.

On the subject of Liability of Municipal Corporations for Excavations and Openings in Streets and Sidewalks, see note in 9 Am. Neg. Rep. 252.

And on the subject of the Liability of Municipal Corporations to a Pedestrian Falling into Opening in Walk, see note in 16 Am. Neg. Rep. 439.

DECLARATION.

Kate Jenkins, a seamstress and dressmaker, complains of J. W. Montgomery, who has been duly summoned to answer the plaintiff of a plea of trespass on the case, to recover against him the sum of Ten Thousand Dollars (\$10,000), damages.

The ground of the plaintiff's action is this, to-wit:

The said defendant heretofore and at the time of committing of the grievances hereinafter mentioned, was engaged and employed in laying a water pipe from the water mains of the Montgomery Light, Water & Improvement Company, of the town of Montgomery, West Virginia, to a certain tenement house owned by Edward Pinkney, and situate on the south side of Fourth Avenue in said town of Montgomery, and in pursuance of said undertaking and employment, heretofore, to-wit: On the 14th day of October, 1905, the defendant dug and excavated and permitted to be dug and excavated, a deep and dangerous ditch in and partially across the public street and highway, to-wit: Fourth Avenue of said town of Montgomery, at a point directly in front of said premises of the said Pinkney, and directly opposite the building known as the Masonic Hall. And the plaintiff saith that while the defendant was thus engaged in digging and excavating said ditch it became and was the duty of the said defendant to use reasonable and ordinary care for the safety of the general public traveling the said street or highway, as well as for the safety of this defendant.

Yet the said defendant, not regarding his duty, did not use due and proper care for the safety of the said plaintiff while so engaged in digging and excavating said ditch or trench, so that the plaintiff could travel said street or avenue with reasonable safety, but the defendant wholly neglected so to do, and wrongfully and negligently permitted the said ditch during the night on or about said date to be and remain open, exposed and without guards, lights or other protection, or notice to citizens and travelers against accident of which the defendant had notice or should have had notice, whereby and by means whereof afterwards, to-wit: On the day and year last aforesaid, in the said city and county, the said plaintiff, then lawfully and in the exercise of due and reasonable care, walking and traveling over and along said street, suddenly and without any warning or notice of any kind whatsoever, that the said ditch or trench was then and there open as aforesaid, it being then and there dark, stepped into the said ditch and fell, and thereby sustained a severe

shock, and suffered painful injuries both externally and internally, and had her right hand and arm permanently injured and sustained other permanent injuries internally; and the plaintiff in consequence of said injuries, became sick, sore and lame and was for many weeks confined to her room to-wit: — weeks, and by means of the premises the plaintiff was forced to and did expend considerable sums of money, to-wit: The sum of — dollars in and about endeavoring to be cured of the said injuries; and that for a long space of time, from, to-wit: Said day aforesaid the said plaintiff has been disabled and suffered great physical pain, and mental anguish and was and is prevented from following her occupation and attending to her duties, and has ever since remained in such condition and so continues and will so continue to permanently remain in such condition by reason of said injuries.

WILLIAMS, P. Kate Jenkins was injured by falling into an open ditch in the nighttime, which she alleges had been dug partially across one of the public streets in the town of Montgomery, by J. W. Montgomery, and negligently left without covering, or any sign to warn the public of danger. She brought an action of trespass on the case in the circuit court of Fayette county against said J. W. Montgomery, and recovered a judgment of \$875. Montgomery has brought the case here on writ of error.

It is insisted that the demurrer to the declaration should have been sustained because it omits the usual *ad damnum* clause. The following statement, however, does appear at the beginning of the declaration, viz.; "Kate Jenkins, a seamstress and dressmaker, complains of J. W. Montgomery, who has been duly summoned to answer the plaintiff of a plea of trespass on the case, to recover against him the sum of ten thousand dollars (\$10,000) damages."

It is insisted that that statement is simply a recital of the contents of the summons, and is not an averment of damages. But whether it should be regarded as an averment, or as a recital, is not material, because, in our opinion, it is a sufficient compliance with the rules of pleading. It informs defendant of the amount of damages claimed. The purpose of the *ad damnum* clause is to inform defendant of the amount of damages demanded, and that is accomplished by the statement above quoted. The more orderly arrangement in pleading is to state the amount of damages at the conclusion, but that is only matter of form. It is immaterial in what part of the declaration the *quantum* of damages may appear. The amount of damages is not a traversable fact necessary to be averred like other

facts which constitute the very gist of the action. General damages is a conclusion of law to be drawn from facts, averred and proven, which constitute the cause of action. The jury, of course, determine the amount, but they do so from proof of other facts, and not because the declaration lays any particular sum. Says Chitty, in Volume 1 (16th Ed.) p. 411: "General damages are such as the law implies or presumes to have accrued from the wrong complained of." And again, on the same page, he says: "It does not appear necessary to state the formal description of damages in the declaration, because presumptions of law are not in general to be pleaded or averred as facts." See, also, Hogg's Pl. § 133. It is well settled that, after verdict, reference may be made to the writ to supply the failure to lay damages in the declaration. *Hook v. Turnbull*, 6 Call. (Va.) 85; *Digges v. Norris*, 3 Hen. & M. (Va.) 268; *Palmer et al. v. Mill*, 3 Hen. & M. (Va.) 502. See, also, opinion of Judge Brannon in *Clarke v. Ohio River R. Co.*, 39 W. Va. 739, 20 S. E. 696. In *Palmer et al. v. Mill*, *supra*, the verdict was for more damages than was laid in the declaration, but less than the writ demanded, and the court read the writ to support the verdict. Now, if after verdict the writ is properly regarded as a part of the record, to support the verdict, why may it not be so regarded on demurrer to sustain the declaration? Is not the laying of damages in the declaration mere formal matter? Is it not a statement of a legal conclusion, and not, therefore, an indispensable averment? Our conclusion is that it is sufficient if it appear in the declaration in any form. It can serve to give defendant no information not furnished by the writ itself, and need not be stated in the form of an averment. The cases of *Lomax v. Hord*, 3 Hen. & M. (Va.) 272, *Moore's Adm'r v. Dawney*, 3 Hen. & M. (Va.) 127, *Donaghe v. Rankin*, 4 Munf. (Va.) 261, and *Spiker v. Bohrer*, 37 W. Va. 258, 16 S. E. 575, to which our attention has been called, do not govern this case. The decisions on those cases involved the question of pleading as it relates to matters of fact constituting the very gist of the action, while the present case involves only the manner of pleading damage, a conclusion of law, and not a fact essential to the cause of action. The declaration is also good in other respects. It avers facts which, if true, give plaintiff a right of action.

Plaintiff's theory of her case is that defendant, who was in the plumbing business, contracted with one Pickney to put the plumbing in a certain house which Pickney was having built in the town of Montgomery, and also to lay the pipe connecting the same with the water main in the street; that a ditch to receive the pipe was

dug across one of the public streets, by defendant's employee, acting under express or implied directions, and was left open, with no sign of warning for a number of days; and that plaintiff, without negligence, was going along the street in the nighttime, and fell into it and was injured. It is sufficient to say that plaintiff's evidence supports this theory, and, notwithstanding the testimony of defendant and some of his witnesses conflict with portions of plaintiff's evidence, the jury are the judges as to the credibility of witnesses and the weight and importance to be given to their testimony, and the law justified their verdict.

It is well-settled law that if one is injured as the direct result of the negligence of a servant or agent in the performance of an act within the line of his duty, and the scope of his employment, the master or principal is liable. Defendant did the work for Pickney by contract which included the digging of the ditch. Pickney paid defendant for the entire job, and defendant paid Brown for digging the ditch. From these facts the jury had the right to infer that Brown dug the ditch under the implied directions of defendant. Brown had been working for defendant by the day for a number of years, and had done similar work without express directions from defendant, when he knew it was to be done. That Pickney may have told Brown where to dig the ditch, in order to connect the water pipe with the main in the street, cannot affect the case. Brown was not the servant of Pickney. Pickney did not employ him, and, of course, could not discharge him, and he had no right to control his actions. These are the principal tests to determine whether or not the relation of master and servant exists. Defendant did employ Brown, paid him for the work, had the power to direct his actions, and could have discharged him.

A number of instructions were given for plaintiff which are objected to. It is useless to discuss them *seriatim*, as their propriety is shown by the law which we have above said is applicable to the case. Particular objection is made to instruction No. 10, which deals with the facts which the jury may consider in determining the *quantum* of damages. It is insisted that it is erroneous, because it assumes that plaintiff is entitled to recover damages in any event. This objection would be well founded, if the jury had not been otherwise instructed concerning the facts necessary to be proven in order to give plaintiff a right to recover at all. No. 10 deals with the single matter of the measure of damages, and it is not proper to segregate it from other instructions, and read it as if it stood alone. Plaintiff's No. 6 clearly propounds to the jury the state of facts which

it is necessary that they must believe to be supported by evidence before they can find a verdict in favor of the plaintiff for any amount. The two instructions, 6 and 10, should be read together. So read, they correctly state the law applicable to the case.

The court refused to give instructions Nos. 3, 4 and 5, for defendant, and that ruling by the court is the subject of complaint. Those instructions would have told the jury that Pickney was liable, because he owned the property for the improvement of which the ditch was dug; that it was Pickney's duty to keep the ditch covered, or guarded. That is not the law in this case. As the town was supplied with a water system, and one of the water mains ran through the street opposite the house, it must be presumed that the opening of a ditch in the street to connect the piping from the house with the water main was the exercise of a lawful right. The execution of a lawful right in a reasonably safe and proper manner cannot be regarded as a nuisance. The digging of the ditch in itself was not an unlawful act, and therefore the opening of the ditch was not *per se* a nuisance.

If the work is lawful, and injury results from the negligent manner of its performance, liability rests upon him who has charge of the work and the right to direct the manner in which it shall be performed. That person in the present case the jury must have believed, as they had a right to do from the evidence, was defendant. His servant was negligent in not keeping the ditch covered, or in not keeping the public warned of its danger by some proper signal, and the law attributes his negligence to his employer. That he covered the ditch with boards, as soon as he finished digging it, is not sufficient to relieve from liability. He should have kept it covered, or properly guarded, until the earth was replaced. It was not covered or guarded when plaintiff fell into it.

There is an error in the amount of the judgment. It exceeds the verdict by \$25. That being below the appealable amount, it does not call for a reversal, but the error appearing by the record, and this court having jurisdiction of the cause of writ of error granted upon other assignments of error we will correct the judgment so as to make it conform to the verdict, and it will then read \$850, instead of \$875. The statute authorizing the correction of such error by the court below upon application to it does not deny jurisdiction to this court to correct it, when the cause is properly before us on other assignments of error.

As so modified and corrected, the judgment will be affirmed.

POFFENBARGER, J. (dissenting). Regarding the declaration as fatally defective on demurrer, I dissent. What is treated as an *ad damnum* clause is plainly only an introductory recital, descriptive of the action and the parties. It is not an averment of damages at all, and does not purport to be.

As damages constitute the very gist of the action in trespass on the case, I think the *ad damnum* clause is indispensable, unless waived by a failure to demur. It is like the promise in *assumpsit*. Although the declaration states facts from which the law raises a promise, the allegation of the promise cannot be omitted. *Grover v. Ohio River R. Co.*, 53 W. Va. 103, 44 S. E. 147, 4 Min. Inst. 697. "It is true that in evidence the law in many cases implies from certain facts that a promise has been made; but in pleading the supposed promise itself should be alleged." 1 Chitty, Pl. (11th Am. Ed.) 301. Similarly, though damages will be implied from certain facts as matter of evidence, it must be alleged as a fact in pleading.

WOOD V. CUNARD STEAMSHIP CO. LTD.

[U. S. CIRCUIT COURT OF APPEALS, SECOND CIRCUIT, S. D. NEW YORK, DECEMBER 12, 1911.]

192 Fed. 293.

1. Carriers—Loss of Baggage—Limitation of Liability—Evidence.

On a libel by one who had been a passenger on board a steamship for the loss of a trunk, evidence held to be insufficient to establish an agreement limiting the liability of the carrier to £5 (five pounds) sterling.

2. Carriers—Baggage—Manuscript.

The manuscript of a manual on Greek grammar, which one who had been a passenger on board a steamship had prepared and of which he had no copy, and which he used in his work as a teacher, contained in a trunk with other property, may be considered as one of the tools of his trade and, as such, a part of his baggage, for which the steamship company is liable if negligently lost.

3. Carriers—Loss of Baggage—Value.

On libel against a steamship company for the negligent loss of a passenger's trunk containing a manuscript of a manual on Greek grammar, evidence held to show that the manuscript was not worth more than \$500.

Appeal by libelant from a judgment of the District Court of the United States for the Southern District of New York, rendered in an action to recover damages for the alleged negligent loss of baggage. Modified and affirmed.

For appellant—Louis Marshall and Abraham Benedict.

For respondent—Lucius H. Beers and Allan B. A. Bradley.

Before LACOMBE, COXE and NOYES, CIRCUIT JUDGES.

CASE NOTE.

Books or Manuscript as Baggage.

Speaking on the general subject of what articles constitute baggage, Hutchinson on "The Law of Carriers," § 1254, says: "The articles which the passenger may claim as baggage may not be such as are usually carried by passengers as personal baggage, and may indeed be but rarely carried with the traveler, and may be wholly useless to him for the purposes of comfort or

convenience on the journey, yet if they be such as are appropriate or essential to the purposes of the journey, whether it be for pleasure or for business, they may be considered as baggage, and the carrier may be held responsible for them as such." See, also, §§ 1242-1249, 1253.

The court in its opinion in *Wood v. Cunard Steamship Co.*, 192 Fed. 293 (the case at bar) has sufficiently set out *Werner v. Evans*, 94 Ill. App. 328

STATEMENT OF FACTS: This cause comes here upon appeal from a decree awarding damages to the amount of \$100 only for the loss of a trunk and its contents. Libelant, an English school-teacher, came from Liverpool to the United States as a steerage passenger on one of defendant's steamers. One of his trunks, which it is conceded was delivered to defendant at Liverpool, has never been found. For wearing apparel, etc., contained therein, the court awarded \$100. Among its contents was the manuscript of a manual on Greek grammar, which he had written, and of which he had no copy. He claims \$5,000 for its loss.

LACOMBE, CIRCUIT JUDGE. The first question which may be considered is whether an agreement was entered into limiting the amount of recovery to £5. The ticket is in the usual form of so-called passenger's contract ticket. The face of the ticket contains many provisions. As reproduced in the record on appeal it covers 3½ pages. Upon it in heavy black type are the words "See Back." On the back in similar type are the words "Notice to Passengers," followed by seven paragraphs containing various provisions. Among them is the following:

"4. Neither the shipowner, nor the passage broker or agent, is in any case liable for loss of or injury to or delay in delivery of luggage or personal effects of the passenger beyond the amount of £5, unless the value of the same in excess of that sum be declared at or before the issue of this contract ticket, and freight at current rates for every kind of property (except pictures, statuary, and valuables of any description, upon which one per cent will be charged) is paid."

This ticket was not signed by the passenger, nor was his attention called to any part of it. The only contention is that he read the notice and must be understood to have agreed to the provisions on the back, since they were prefaced with the words:

"This contract is made subject to the following conditions."

We are not convinced by the evidence that the libelant read the

(1901) and *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64, Fed. Cas. No. 6692 (1868), which are two of the leading authorities on the subject discussed in this note. Other cases on the same point are the following:

In *Doyle v. Kiser*, 6 Ind. 242 (1855), the court said that "a few books for the amusement of reading" may properly be regarded as baggage. And in

Macrow v. Great Western Ry. Co., L. R. 6 Q. B. 612 (5 Am. Neg. Rep. 62n), the court mentioned "the books of a student, and other articles of an analogous character" among articles properly classed as baggage.

Catalogues and papers pertaining to a passenger's business and carried by him in a satchel, were regarded as personal baggage in *Runyan v. Central*

notice, and could only find that he did read it by an assumption which might or not be well-founded. The libelant testified that he had no distinct recollection of having examined the notice, but felt sure he had done so. This he immediately qualified by stating that he did not know that there was any limitation of liability contained in the notice. The only fair interpretation of his testimony is that, although without distinct recollection, he did examine the notice in a general way, but did not know that there was any limitation in it. There is no satisfactory proof of any such meeting of the minds of the parties as would constitute an agreement materially to modify the obligations of the carrier, and without such agreement we do not think this indorsed notice can be imported into the contract.

The more important question in the case, however, is whether this manuscript may properly be considered an item of passengers' baggage. The libelant has described the manual at considerable length. The scheme of the book was that pupils should be taught Greek on exactly the same system on which they are taught modern languages; that is to say, to be able to speak it, as well as to be able to read and write it. He got the idea originally from a French scholar named Galland. It was partly written and partly typed, and libelant had been engaged in its preparation while a student in the university from which he graduated and during about eight years thereafter, while he was engaged in teaching. Of course, he worked at it only at intervals. He testified that he hoped in the course of time to publish it; but its immediate purpose, and the reason why he carried it about with him, was as an aid to teaching. He used it as a lecturer on professional subjects uses the notes and excerpts from which he draws the material for his lectures.

Passenger's baggage is not confined to wearing apparel and similar articles. In *Porter v. Hildebrand*, 14 Pa. 129, it was held that a reasonable amount of the tools with which he works may be carried by a journeyman carpenter as baggage. The court says that the right to carry tools as baggage is unquestionably open to abuse, but

R. Co. of New Jersey, 61 N. J. L. 537, 5 Am. Neg. Rep. 58, 43 L. R. A. 284, 68 Am. St. Rep. 711 (1898).

But papers pertaining to the business of an insurance agent, belonging to his employer, and carried by the former in a trunk containing wearing apparel, were held in *Yazoo & M. V. R. Co. v. Georgia Home Ins. Co.*, 85 Miss. 7, 17 Am. Neg. Rep. 306, 67 L. R. A. 646,

107 Am. St. Rep. 265 (1904), not to be baggage, and, therefore, an action cannot be maintained for the benefit of the employer for loss caused by delay in transportation. The court said: "The sheets of paper constituting the memoranda of the agent, Mr. Blackmar, are manifestly papers relating exclusively to the business of the company. We are unable to concur in the

adds that the correction is to be found in the intelligence and integrity of the jury called to determine under the circumstances of each case.

To the same effect are *Davis v. Cayuga & S. R. Co.*, 10 How. Prac. (N. Y.) 330 (harnessmaker's tools, valued at \$10), and *Kansas City R. R. v. Morrison*, 34 Kan. 502, 9 Pac. 225, 55 Am. Rep. 252 (a set of watchmaker's tools, apparently not of great value). In *Staub v. Kendrick*, 121 Ind. 226, 23 N. E. 79, 6 L. R. A. 619, a traveling salesman's illustrated catalogue, valued at \$50, was held to be baggage; and a similar conclusion was reached in *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, 14 Am. Rep. 716. In *Texas & P. R. Co. v. Morrison Faust Co.*, 20 Tex. Civ. App. 144, 12 Am. Neg. Rep. 67, 48 S. W. 1103, manuscript music used in connection with the business of a traveling dramatic company was held to be baggage; the amount is not stated. In *Werner v. Evans*, 94 Ill. App. 328, the record books of a professional nurse were included in a verdict which was considered on appeal. The court said:

"We think the record book in question might reasonably be included in the articles which, without imposition on the carrier, appellee could properly have carried in such valise, and for the loss of which she is entitled to be compensated at such valuation, as from the evidence, the jury should find. The said books were, it appears from the evidence, implements used in her vocation as nurse, and such as she might properly include with her garments, also used in such employment, as a part of her reasonable baggage. It was not necessary to show that the books had a general market value, in order to prove what they were reasonably worth to appellee."

In *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. (U. S.) 262, 20 L. Ed. 423, it was held that surgical instruments, the property of an army surgeon traveling with troops, may properly be regarded as part of his baggage.

A case quite similar to the one at bar is reported in *Hopkins v. Westcott*, 6 Blatchf. 64, Fed. Cas. No. 6692 (C. C. Southern District

view that they can in any proper or legal sense fall within the legal definition of baggage. They are not such things as were for his personal use or his personal convenience. Their use was in no sense personal to the traveler. On the contrary, they were carried, distinctly and exclusively for the purpose of business * * *. The railroad company knew nothing about these mem-

oranda being in the trunk, and it is not a case where the railroad company has consented to receive or accepted these memoranda as baggage knowingly, or in accordance with any usage or custom of the railroad."

In *Hurwitz v. Hamburg-American Packet Co.*, 27 Misc. 814, 56 N. Y. Supp. 379 (1899), it was held that no recovery can be had for books as constitut-

of New York). There plaintiff, who was a student at Columbia College and was proceeding to New York for the prosecution of his studies, carried in his trunk five manuscript books (presumably notes of lectures he had attended) which were necessary for carrying on his studies after he got there. No one of them "exceeded \$100 in value." Judge Shipman held as follows:

"Now it may safely be said that books constitute to some extent a part of the baggage of every intelligent traveler. Especially is this the case with scholars, students, and members of the learned professions. There is no reason why they should not be under the protection of the law, as against the negligence of carriers, as well as any other portions of their baggage. But it is said that no case can be shown where the carrier has been held liable for manuscripts. No such case has been cited, and in my researches I have found none. But I see no reason for adopting a rule by which they should be excluded, under all circumstances, from the list of articles termed 'baggage.' With the lawyer going to a distant place to attend court, with the author proceeding to his publishers, with the lecturer traveling to the place where his engagement is to be fulfilled, manuscripts often form, though a small, yet an indispensable, part of his baggage. They are carried, as such, in his trunk or portmanteau, among his other necessary effects. They are indispensable to the object of his journey; and, as they are carried with his baggage, in accordance with universal custom, I see no reason why they should not be deemed as necessary a part of his baggage as his novel or fishing tackle. In the present case, the manuscript books lost are admitted to have been necessary articles for the student at the institution to which he was proceeding. They must, under all circumstances, be deemed to have been a part of his baggage, for which the defendants are liable."

We cannot agree with the respondent's counsel that this opinion, which was cited on the argument in *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. (U. S.) 262, 20 L. Ed. 423, was overruled by the decision in that case. The army surgeon whose surgical instruments were al-

ing a part of a passenger's baggage, which she had bought for her husband with money which he had sent her to purchase for him.

The value of an unpublished treatise on veterinary surgery, was excluded in *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. (U. S.) 262, 20 L. Ed. 423 (1870), in estimating the amount to be allowed an army surgeon for the loss of cer-

tain baggage and personal property.

Manuscript music which is used by a traveling company in its business of giving concerts, has been held to be baggage, for the negligent loss of which the carrier is liable. *Texas & P. R. Co. v. Morrison Faust Co.*, 20 Tex. Civ. App. 144, 12 Am. Neg. Rep. 67 (1898).

And a manuscript "price book" carried by a commercial traveler about

lowed as baggage had also in his trunk an unpublished treatise on veterinary surgery. Its value was disallowed in the court below, and no appeal was taken from such disallowance. All that the Supreme Court says about it is that "the value of the unpublished treatise was excluded in the amount allowed" below.

We think that, under the authorities, a manuscript such as this, which is used by a teacher when giving instruction to pupils, may be fairly considered as one of his tools of trade, and as such properly included with his baggage. There is no suggestion in *Hannibal & St. J. R. Co. v. Swift*, *supra*, that the treatise on veterinary surgery was used for any such purpose.

We are of the opinion that the value which the libelant puts upon the manuscript, \$5,000, is unreasonable, and that it would be an imposition upon the carrier to exact any such as compensation for its loss. Since the original has disappeared, and could not be exhibited to witnesses who might be called to testify to its value, it is not at all likely that any further enlightenment would be obtained from a reference as to such value. The author has testified to the time it would take to reproduce it, and we have evidence from which we can form an opinion as to the value of such time. The "two years" he spoke of does not, we think, mean two years of continuous work. We have all that a jury would have upon which to assess value, and our conclusion must be, as a jury's frequently is, somewhat arbitrary.

This being an admiralty case, and the hearing before us a new trial, we have probably all the essential facts which would be produced before a commissioner, were a reference ordered to ascertain the value. Such a reference would entail additional expense, without corresponding advantage. Professors of Greek might be called as witnesses, and asked hypothetical questions as to the value of the manuscript as described by the libelant. That they would disagree may be taken for granted, and the court would be left in substantially the

with him in his valise, while engaged in selling tools and cutlery, and used by him to ascertain values when making sales, because he could not remember the various prices, is a part of his personal baggage. *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85, 14 Am. Rep. 716 (1873). In the opinion the court said: "It (the book) was a thing of personal use and convenience to the plaintiff ac-

ording to the wants of the particular class of travelers to which he belonged.
* * * It was not an article of merchandise or the like, or anything designed for use ulterior to the purposes of his journey, but a book of memoranda convenient and necessary for him personally in accomplishing the object of his travel. It was personal baggage, within the definition and rule of law

same predicament as at present with no definite criteria as to value

The case in this respect is *sui generis*. The lost manuscript is unique in its isolation. There is nothing with which to compare it. In these circumstances, believing that there are certain limits in each direction, beyond which we should not go, we deem it for the best interests of the parties that the amount of the recovery should be fixed without further expense to the litigants, and we fix \$500 as a fair reward for the lost manuscript.

This conclusion is concurred in by a majority only of the court. The writer is of the opinion that recovery should be only for what it would have cost to make a copy of the manuscript, upon the theory that it was an imposition on the carrier to place this unique and valuable manuscript among the passenger's baggage as a "tool," when he could have carried with him a tool quite as serviceable in the shape of a copy.

The decree of the District Court is modified accordingly, and, as modified, is affirmed, with costs to the appellant.

upon that subject."

The holding of the Gleason case, *supra*, was followed in *Staub v. Kendrick*, 121 Ind. 226, 6 L. R. A. 619 (1889), in which the court held a car-

rier liable for the loss of a catalogue carried by a salesman of hardware among his baggage for his personal use and convenience and necessary in the discharge of his duties.

NORFOLK AND ATLANTIC TERMINAL CO. v. ROTOLO.

[U. S. CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, E. D. VIRGINIA, APRIL 9, 1912.]

195 Fed. 231.

1. Carriers—Street Railway Company—Injury to Passenger—Evidence—Custom.

In an action to recover damages for injuries sustained by a passenger who, while attempting to board a car by means of the platform on the side of the parallel tracks, was struck by a car on such tracks, in which the evidence was conflicting on the question whether the car which the passenger was attempting to board stopped at the time and point where passengers were in the habit of boarding cars, evidence of a custom on the part of the street car company to stop its cars at such point to permit passengers to alight from or to board its cars, was relevant to uphold plaintiff's contention, although standing alone it was insufficient proof that the car stopped at that point at the time of the injury.

2. Carriers—Injury to Passenger—Contributory Negligence—Last Clear Chance.

Although a passenger was guilty of negligence in attempting to board a moving street car by going upon the steps on the side of the car toward the parallel tracks of the company when the gate of the car was closed, yet if the company could, by the exercise of reasonable care, have discovered the dangerous position of the plaintiff, the obligation devolved upon the company, under the doctrine of last clear chance, to avoid causing him injury by contact with another car.

3. Carriers—Injury to Passenger—Negligence in Entering Car.

A street car company is liable for injuries sustained by a passenger who boarded a car at the place where cars were accustomed to stop to take on and discharge passengers at both sides, in consequence of the negligence of the company in running a car on a parallel track against him while he was on the lower step.

4. Trial—Weight of Evidence—Question for Jury.

It is the province of the jury to determine the facts in a case in which the testimony is peculiarly contradictory.

In error to the Circuit Court of the United States for the Eastern District of Virginia, to review a judgment rendered in favor of plaintiff Frank Rotolo, in an action brought against the Norfolk & Atlantic Terminal Company to recover damages caused by the alleged negligent operation of a street car. Affirmed.

NOTE.

On the subject of Injury to Passengers While Alighting from or Boarding Street Cars, see notes in 7 Am. Neg. Rep. 367; 9 Am. Neg. Rep. 17 and 572; 14 Am. Neg. Rep. 325, and 21 Am. Neg. Rep. 574-597 and 604-635.

And see, also, Vols. 2-7 Am. Neg. Cas., where the decisions on "Alight-

ing and Boarding Cases" from the earliest period to 1896 are reported and arranged in alphabetical order of States.

And for subsequent decisions from 1897 to date on "Alighting and Boarding Cases" see Vols. 1-21 Am. Neg. Rep., and the new series of Negligence and Compensation Cases Annotated (N. C. C. A.).

For plaintiff in error—W. H. Venable and Eppa Hunton, Jr. (Henry W. Anderson, on the brief).

For defendant in error—J. L. Jeffries (Jeffries, Wolcott, Wolcott & Lankford, on the brief).

Before GOFF and PRITCHARD, CIRCUIT JUDGES, and BOYD, DISTRICT JUDGE.

STATEMENT OF FACTS: This is the third time this case has been before the court here. The first time several points arising upon the pleadings, and in the trial of the cause, were passed upon by this court. See *Norfolk & Atlantic Terminal Company, Plaintiff in Error, v. Rotolo, Defendant in Error*, 179 Fed. 639, 103 C. C. A. 197. Then came the case of *Norfolk & Atlantic Terminal Company, Plaintiff in Error v. Rotolo, Defendant in Error*, and the decision of the court in that instance is reported in 191 Fed. 4. The following is a succinct statement of the facts:

The plaintiff in error, defendant below, hereinafter called the defendant, is a Virginia corporation, and operates a line of electric street railway in the city of Norfolk, Va., and had a portion of its tracks laid in City Hall Avenue and Monticello Avenue in said city. Frank Rotolo, the defendant in error, who was the plaintiff below, hereinafter called the plaintiff, is a subject of the king of Italy, and was temporarily residing in Norfolk at the time of the injury, which was the cause of this action. The tracks of the defendant's railway run parallel along Monticello Avenue in the city of Norfolk, north and south, and at a point about opposite the Monticello Hotel corner, where the City Hall Avenue intersects with Monticello Avenue, and about midway between that corner on the west and market corner on the east, the tracks diverge, the one curving sharply to the right, or southwest, and the other curving sharply to the left, or southeast. The plaintiff, as before stated, was temporarily residing in Norfolk, and was employed as a workman at the Jamestown Exposition. On the 1st day of August, 1907, between 6 and 7 o'clock in the morning, the plaintiff, intending to go to the Exposition grounds, attempted to board one of defendant's cars which had come in from Pine Beach, and was bound south, and was due to turn the curve in the railway above described, to the southwest, and whilst attempting to board the said car, and when on the steps of the rear platform on the side next to the other tracks, he was struck by another car either standing on the curve which turned to the southeast, or moving along around said curve toward the north, and so injured

that his left leg had to be amputated. Plaintiff brought this action against defendant in the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk, to recover damages for the injury on the ground that it was the result of the defendant's negligence, and in the last trial was awarded \$4,000 with interest from November 22, 1911, for which amount judgment was rendered in his favor against defendant. The case is here by writ of error sued out by the defendant.

BOYD, DISTRICT JUDGE. The assignments of error relied on by the plaintiff in error, who will hereinafter for convenience be called the defendant, in the case before us now, are two in number. The one is based on exception to the admission of testimony, the other on exception to the action of the trial court in submitting to the jury upon all of the testimony the question of the last clear chance.

As to the first proposition, the defendant in error here, who will be referred to as the plaintiff, in the course of the trial, over the objection of the defendant, was permitted by the court to testify that the defendant's cars coming south from Pine Beach were in the habit of stopping at the point where he (the plaintiff) attempted to go aboard at the time of the injury, and that the gates on both sides of the cars when stopped at this point were opened and passengers were permitted to dismount from the cars, and also to go aboard on both sides. Other witnesses for the plaintiff, over the objection of the defendant, made substantially the same statement. The ground of the objection to this testimony, as stated in the bill of exceptions, is as follows:

"* * * For the reason that the testimony was irrelevant and immaterial to the issue in this case, and for the reason that it was improper to prove any custom as evidence that the defendant stopped its car at the point claimed in the declaration, and that the gates on both sides of cars were customarily opened by the defendant, and for the reason that the evidence was not limited to a car coming from the car barn without passengers to discharge, but only to receive passengers for the Exposition."

In the argument the counsel insists that this testimony was inadmissible to prove the fact that the car, on the step of which the plaintiff was standing when he was injured, stopped at the point referred to at the particular time in question. We readily concede that, standing alone, testimony that it was the custom or habit of defendant to stop its cars and discharge and take on passengers at the point where plaintiff attempted to go aboard, was insufficient to prove

the fact that the car stopped on the occasion of the injury, but plaintiff testified that the car did stop at the point and at the time in question, and that the gates were opened and passengers dismounted and others went aboard. Other witnesses for the plaintiff testified to the same effect. On the other hand, a number of witnesses for the defendant testified that the car did not stop, and thus there was a direct irreconcilable conflict of testimony as to the fact. Under these circumstances, in our opinion, testimony that it was the custom of the defendant to stop its cars at this point was not only relevant, but it tended to throw light upon the controverted fact and to sustain plaintiff's contention.

The text-writers and the courts have provided us with much learning and numerous decisions relative to the admissibility, the relevancy and probative value of testimony in regard to habit or custom as showing the doing, or not doing, of a particular thing on a specific occasion. Wigmore, in his treatise on Evidence (vol. 1, § 92), cites the case of *Walker v. Barron*, 6 Minn. 508-512 (Gil. 353), in which it is said:

"Customs may, like other facts or circumstances, be shown when their existence will increase or diminish the probabilities of an act having been done, or not done, which act is the subject of contest."

And, also in the case of *State v. Railroad Co.*, 52 N. H. 528, in which it is held:

"It would seem to be axiomatic that a man is likely to do, or not to do, a thing, or do it or not do it in a particular way (according) as he is in the habit of doing it, or not doing it."

The same doctrine is laid down in the case of *Parrott v. Railroad Co.*, 140 N. C. 546, 53 S. E. 432.

In *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860, Mr. Justice Day, in delivering the opinion of the court, used this language:

"* * * As we have said, the question concerns the relevancy of proof, and not whether it finally establishes the issue made, one way or the other. Relevancy does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact. Relevancy is that 'quality of evidence which renders it properly applicable in determining the truth or falsity of the matter in issue between the parties to a suit.' 1 Bouvier, Law Dic. Rawle's Revision, 866."

In *Holmes v. Goldsmith*, 147 U. S. 150, on page 164, 13 Sup. Ct. 288, on page 292 (37 L. Ed. 118), Mr. Justice Shiras, in delivering the

opinion of the court, adopts the following from the case of *Stevenson v. Stewart*, 11 Pa. 307:

"The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth."

Our views, as will be seen, are in harmony with the principles announced in these cases. But, aside from this, if the testimony objected to was relevant to any material issue in the case, it was not error to admit it. Defendant insisted that the injury was the result of plaintiff's negligence, and one of the negligent acts charged to him was that he had crossed the parallel track and had attempted to board the car whilst it was in motion at a place where there was no stop. We think, under the circumstances, that it was plaintiff's right to introduce testimony to prove that it was the custom or habit of defendant's cars to stop at that point, to open gates to the cars, and there receive and discharge passengers; not that this testimony alone, as before stated, was sufficient to prove the fact that the car stopped on the occasion when plaintiff was injured, but it was relevant, in our opinion, as bearing upon plaintiff's conduct at the time, and in explanation of his presence at the place where he undertook to go aboard. The custom or habit of railway trains or cars to stop at a particular place to receive and discharge passengers is notice to the public to go to that place for the purpose of taking passage on such trains or cars. Our conclusion, therefore, is that there was no error in the admission of the testimony embraced within this exception.

On the remaining question presented for our consideration the counsel for the defendant takes the position that (we quote from the brief):

"The doctrine of the last clear chance has no application in this case, but that it is in the view most favorable to the plaintiff a case of concurrent negligence in which there can be no recovery."

There is nothing in the record to advise us that the jury based the verdict in this case upon the doctrine of the last clear chance, although we think that upon the evidence for the plaintiff, and that of the defendant, this principle might properly have been invoked.

If the jury found that the plaintiff negligently put himself in peril by going upon the steps of the car whilst it was moving, and when the gate was closed, yet the duty devolved upon the defendant if the

plaintiff's situation of peril was seen or could, by the exercise of reasonable care, have been seen, and the injury could have been avoided by the use of such care on the part of the defendant, then the last clear chance proposition could be applied.

On the other hand, if plaintiff's version was accepted by the jury, and there was testimony to support it, that plaintiff went to the place where the cars of defendant were accustomed to stop and take on and discharge passengers, that the car plaintiff undertook to board did stop, that passengers were admitted from both sides, that plaintiff was on the lower step following others into the car, and in this position the defendant injured him by negligently running another car upon him, as we say, if the jury found from the evidence that such were the facts, then the doctrine of the last clear chance was not involved, but the injury would be accredited directly to the negligence of the defendant when the plaintiff was not in the wrong.

However, as we have stated, the testimony in this case was peculiarly contradictory, and it was the province of the jury to determine what the truth of the transaction was. The counsel voluntarily abandoned an exception which had been taken to the refusal of the court to direct a verdict for the defendant upon all the testimony. This seems to us an admission that there was sufficient evidence to go to the jury to authorize a recovery in favor of the plaintiff in some view of the case.

We think the judgment of the Circuit Court should be affirmed.
Affirmed.

RODGERS v. HARPER AND MOORE.

[SUPREME COURT OF ALABAMA, JUNE 16, 1911.]

170 Ala. 647.

1. Negligence—Sawmill—Frightening Horse.

The owner of a saw and planing mill from which shavings and dust are thrown through a blowpipe toward the highway, is not liable for personal injuries sustained by a traveler whose horse took fright when passing the mill, unless the objects discharged are such as to frighten a horse of ordinary gentleness.

2. Trial—Directing Verdict—Question for Jury.

It is error to give a general affirmative charge for a defendant where there is proof on plaintiff's part of the existence of the essential fact in issue.

Appeal by plaintiff from a judgment of the Circuit Court of Pickens County, rendered in favor of defendants in an action by Josephine Rodgers against Harper and Moore to recover damages for personal injuries caused by being thrown from a buggy when plaintiff's horse became frightened at the act of defendants in throwing shavings and dust into the highway. Reversed.

For appellant—Curry and Robison, and Oliver, Verner and Rice.

For appellees—Henry A. Jones.

SIMPSON, J. This action is by the appellant, against the appellees, for damages on account of personal injuries received by being thrown from a buggy. It is claimed that plaintiff's horse became frightened, while passing along the public road, opposite the saw and planing mill of defendants, which was situated near the public road, by the steam and shavings from said mill. The evidence shows that complaint had been made to the road supervisor in regard to the mill, and that at his suggestion the defendants had erected a plank wall at the side of the road to prevent the shavings from being thrown into the road, and also had taken off one of the joints of the blowpipe, so as to keep it from blowing the shavings and dust so far

NOTE.

On the subject of Injuries Caused by Horses Taking Fright at Noises and Various Objects on Highway, see note in 21 Am. Neg. Rep. 445.

And see, also, Notes of cases relating to Accidents Caused by Horses Being Frightened by Obstructions, etc., on Streets, etc., in 14 Am. Neg. Rep. 651-669.

The supervisor testifies that this was satisfactory to him. Plaintiff's evidence shows that she and her daughters were driving along the said public road, and when the mill was started shavings and dust flew over the wall onto her horse, and he became frightened and ran away, throwing her out and causing the injury complained of. Plaintiff testified that the shavings and dust fell all over the horse, her children and herself; that in striking the plank wall the shavings made a noise like a hailstorm; that the horse showed no sign of fright until the shavings came out, but that he commenced jumping when the shavings hit him; that she knew that, as soon as the timber struck the wall, the shavings would begin to come out, but did not know whether the plank wall would catch them; that the shavings went up and came down on the horse. Plaintiff's 15 year old daughter, who was driving the horse, testified that the horse was gentle, that she had driven him frequently and had no trouble with him, that he was not frightened until the shavings fell on him, that she had seen shavings coming out there before, when she was driving said horse, and also steam coming out, and he did not become frightened. Two of plaintiff's witnesses testified that their horses became frightened at that place, but each said that his horse was wild. One of plaintiff's witnesses testified that the shavings would not fly over the wall from the force of the blowpipe, but that, if the wind was blowing, fine dust and small portions of the shavings might be blown over.

It is a general principle that one placing objects within the limits of a public highway, which are calculated to frighten horses of ordinary gentleness, is liable therefor; but in order to fix liability, it is necessary to allege and prove that the object is calculated to frighten a horse of ordinary gentleness. As stated in one of the cases, "it is clear that the rule cannot apply to all horses, irrespective of disposition, for a horse might take fright at a discoloration in the road, a bush, a stone, post, leaves, or other objects, for which it would be unreasonable to charge a town with liability." *Stone v. Langworthy*, 20 R. I. 605, 40 Atl. 833 (column 2), 6 Am. Neg. Rep. 86; *Joyce on Nuisances*, 255; *Grunauer v. Westchester F. Ins. Co.*, 72 N. J. Law. 289, 62 Atl. 418, 3 L. R. A. (N. S.) 111; *Morse & Wife v. Richmond*, 41 Vt. 435, 444, 98 Am. Dec. 600; *Dimock v. Town of Suffield*, 30 Conn. 129, 134; *Card v. City of Ellsworth*, 65 Me. 547, 20 Am. Rep. 722, 728; *Piollet v. Simmers*, 106 Pa. 95, 51 Am. Rep. 496, 504, 505; *N. Ala. Ry. Co. v. Sides*, 122 Ala. 594, 26 South. 116. The same principle applies to objects so near the highway as to have the same tendency. *Elliott on Roads & Streets* (2d Ed.) 649, pp. 696, 697. At least it is said: "Certainly no higher degree of care, if as high, should be required of

a person placing or leaving near the highway, on his own premises, appliances in use therein." *Norfolk & W. R. A. Co. v. Gee*, 104 Va. 809, 52 S. E. 573, 3 L. R. A. (N. S.) 113.

It is not necessary to decide what, if any, would be the liability for mere noise or steam from machinery near the public road; but for throwing objects into the public road a liability would exist within the restrictions found in the foregoing authorities. It is essential to show that the object thrown is such as to frighten a horse of ordinary gentleness.

The court is of the opinion that, under the evidence in this case, it was a question for the jury to decide whether or not the object in this case was calculated to frighten a horse of ordinary gentleness. Consequently the court erred in excluding the evidence and in giving the affirmative charge for the defendants.

The judgment of the court is reversed, and the cause remanded.

ANDERSON, McCLELLAN, and MAYFIELD, JJ., concur.

McLAUGHLIN v. KELLY, JR.

[SUPREME COURT OF PENNSYLVANIA, JANUARY 3, 1911.]

230 Pa. 251.

1. Highways—Iron Grating—Safe Condition.

A property owner is not relieved from the duty of keeping an iron grating, forming a part of the sidewalk in front of his premises, and the wooden frame on which it rests, in a safe condition, by the fact that the grating is close to the building.

2. Highways—Iron Grating—Inspection.

The fact that an iron grating, resting on a wooden frame and forming a part of the sidewalk, had been in position for over 20 years, imposes on the abutting property owner, as a prudent man, the duty of inspection.

3. Highways—Defects—Leased Premises.

A landlord is liable to a pedestrian who is injured because of a defect in the sidewalk in front of the demised premises which existed when the tenant's lease was renewed.

4. Evidence—Sufficiency—Notice.

A finding that a landlord knew, or by the exercise of reasonable diligence, could have known of the defective condition of the framework supporting an iron grating in the sidewalk in front of his premises, is sustained by proof that the defect had existed for ten or fifteen years and that the landlord had visited the premises monthly during that period to collect the rents.

Appeal by defendant from a judgment of the Court of Common Pleas of Allegheny County, rendered in an action brought by Mary McLaughlin against Edward Kelly, Jr., to recover damages for personal injuries sustained by falling into an opening in a pavement on a public street. Affirmed.

For appellant—Willis F. McCook and B. J. Jarrett.

For appellee—Leonard S. Levin.

MESTREZAT, J. This is an action for trespass brought by a pedes-

NOTE.

On the subject of Liability for Coal Hole Accidents, see notes in 18 Am. Neg. Rep. 217.

And on the Liability of Landlord for the Condition of Coal Holes in Sidewalk, see note in 3 Am. Neg. Rep. 314.

On the general subject of Liability of Landlord or Tenant for the Dangerous and Defective Condition of Premises, see notes in 7 Am. Neg. Rep. 260, 437, 608; 8 Am. Neg. Rep. 6; 9 Am. Neg. Rep. 560.

train to recover damages for injuries she sustained in falling into an opening in the pavement on Wylie avenue, Pittsburg. The plaintiff testified that she was walking on the pavement in front of defendant's premises about 8 o'clock on the evening of November 3, 1906, and meeting some friends, stopped to talk to them. The street was crowded, and in stepping aside to avoid the crowd she fell into a hole in front of defendant's building and was severely injured. The hole led into the cellar and was covered by an iron grating resting on a wooden frame. It extended about 14 inches from the building and was 28 inches long and 26 inches wide. The plaintiff alleges that the frame work had become rotten and insufficient to properly support the grating, and that its defective condition was the result of the defendant's negligence.

At the time of the accident the premises were leased to and in the actual possession of a tenant. The defendant had owned the property for about 20 years, during which time there had been no change made in the hole and no repairs made to the covering. In May, 1904, he let the premises to a tenant until April 1, 1905. In January, 1905, he relet the premises to the same tenant for a period of three years from April 1, 1905. This tenant was in possession November, 1906, when the plaintiff fell into the hole and was injured.

The defendant denies that the plaintiff's injuries resulted from his negligence because: (a) The grating was so close to the building and away from the line of travel that he could not be held to have foreseen the accident, and the length of time in which the sidewalk had been used removed any doubt as to its reasonable safety; (b) the premises were in possession of a tenant whose duty it was to repair; and (c) the evidence was insufficient to impute notice of the defect to the defendant.

We do not think any of these reasons sufficient to defeat the action. The proximity of the hole to the building did not relieve the defendant from using reasonable care to keep the grating and its wooden support in proper and safe condition. The public had the right to use the whole of the unoccupied portion of the pavement—from the building line to the curbstone—and the primary duty of keeping it in repair rested upon the owner of the abutting premises. The grating was a part of the sidewalk, and it was the duty of the property owner to exercise the same care in keeping it in safe condition as any other part of the pavement. It has been ruled by this court that a property owner maintaining a coal hole or other opening in a sidewalk is bound to know that persons will pass and repass and step upon the cover without apprehending danger, and he is therefore

held to care and diligence in keeping it secure. This applies to the whole sidewalk which is open and in use by the public.

We are not impressed with the argument that the length of time the grating had been in use removed any doubt as to its reasonable safety. If that be true, the wood and iron in a pavement or building would become more durable as the years went on, and consequently the necessity for inspection and repairs would diminish with the growing age of the structure. The fallacy of such logic is apparent. On the contrary, the fact that this grating had been supported by the same wooden frame for at least 20 years to the defendant's knowledge, and possibly for a much longer time, was notice to him as a prudent man that effective inspection might show that the iron and the wood supporting it should be replaced. The defendant's own testimony discloses that he did not make such inspection as would detect the real condition of either the grating or its wooden support.

That the premises at the time of the accident were in possession of a tenant does not, under the circumstances, relieve the defendant from his duty to inspect and repair the pavement. The primary duty of keeping a sidewalk in repair rests upon the owner of the abutting premises. The municipality is liable to a party injured by reason of its defective condition, but the owner is ultimately responsible. If the sidewalk becomes defective while in the occupancy and control of a tenant resulting in injury to a third person, the tenant is liable, and, if the defect existed at the time of the demise, the landlord is responsible to the injured party. This is ruled in many cases. *Knauss v. Brua*, 107 Pa. 85; *Fow v. Roberts*, 108 Pa. 489; *Wunder v. McLean*, 134 Pa. 334, 19 Atl. 749, 19 Am. St. Rep. 702; *Reading City v. Reiner*, 167 Pa. 41, 31 Atl. 357; *Brown v. White*, 202 Pa. 297, 12 Am. Neg. Rep. 132, 51 Atl. 962, 58 L. R. A. 321; *Kirchner v. Smith*, 207 Pa. 431, 16 Am. Neg. Rep. 463, 56 Atl. 947. The landlord cannot relieve himself from liability by placing the tenant in possession of the property. It is his duty to remove the nuisance or defect before he delivers the premises to the tenant, and, if injury results on account of his failure to perform this duty, he is not relieved from liability by reason of the tenant's possession. To relieve a landlord from liability under such circumstances would be, as said by Barrows, J., in *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503, contrary to public policy and substantial justice, for it would not infrequently operate to deprive the injured party of all remedy except against an irresponsible tenant through whom a negligent landlord would reap the profits, without bearing the responsibilities of his proprietorship.

While the defendant had been the owner of the property for 20

years or more, it seems that during all that time it had been in possession of a tenant. As noted above, the defendant let the premises until April 1, 1905, and during the preceding January he relet to the same tenant for a term of three years from April 1, 1905. The accident occurred in November, 1906. It was claimed by the plaintiff on the trial, and she submitted testimony to show that the defect in the sidewalk existed at the time the premises were let to the tenant who was in possession when the plaintiff fell in the hole and was injured. It is contended by the defendant that by reason of the tenancy he was not in possession of the premises and therefore could not have repaired the grating. But this position is not tenable. The ground of the defendant's liability for the nuisance is that it existed at a time when he had the opportunity or power to abate or remove it and failed to do so. When the lease was executed and the term created, the finding of the jury is that the defect existed. It was then his duty before renewing the lease to have abated the nuisance. It was within his power to do so, and his failure to exercise that power imposes liability. "Nor do I perceive how the liability of the landlord in such cases," says Magie, J., in *Ingwersen v. Rankin*, 47 N. J. Law, 18, 54 Am. Rep. 109, "will be diminished by the fact that he renewed the tenant's lease without retaking actual possession. Such a conclusion would be opposed to the principles creating and governing his liability. If a nuisance is created during a term already existing, no liability falls on the landlord pending that term, for the reason that he has no legal means of abating the nuisance. He cannot enter upon his tenant's possession for that purpose, and would be a trespasser if he did so. But when the term expires his right of entry and power to abate at once arises, and for that reason a liability commences. If he declines to re-enter and abate the nuisance, and relets the premises, the liability which arose at the termination of the term will be neither discharged nor abated. The test of his liability in such case is his power to have remedied the wrong. If he has, but fails to exercise, such power, his liability remains. The cases seem to be uniform in this view." The same doctrine prevails in England: *Rex v. Pedley*, 1 Ad. & E. 822; *Rich v. Basterfield*, 4 C. B. 782; *Todd v. Flight*, 30 L. J. Ch. 21. And in New York: *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778.

We do not agree with the contention that the evidence was not sufficient to warrant submitting the question of actual and constructive notice to the defendant of the defect in the sidewalk. This is

not an action against the municipality, but against the owner of the premises whose duty it was primarily to keep the premises in repair. *Duncan v. Phila.*, 173 Pa. 550, 34 Atl. 235, 51 Am. St. Rep. 780; *Mintzer v. Hogg*, 192 Pa. 137, 43 Atl. 465. As said by Mr. Justice Clark in *Dickson v. Hollister*, 123 Pa. 421, 429, 16 Atl. 484, 486 (10 Am. St. Rep. 533): "It was his duty to exercise reasonable care and diligence, not only in making, but in keeping it (the sidewalk) safe and secure. He was bound to know that persons would pass and repass on this pavement not only in daytime, but in the nighttime also. * * It is quite certain that this cover was not secure, or it would not have turned, and the jury has found that its insecure condition was owing to the defendant's want of due diligence and care concerning it. It is absurd to say that, in order to charge the owner of the premises with notice, 'the defect must be so notorious as to be evident to all pedestrians passing in the immediate neighborhood.'" The primary duty, therefore, rested upon the defendant as landlord to exercise the care of a reasonably prudent man to protect the public using the sidewalk from dangers necessarily incident to a defective covering of the hole in the pavement. It was testified that the grating rested on wooden strips or framework, and that at the time of the accident "the entire framework was entirely rotted away." The testimony further showed that it had been in a defective condition for 10 or 15 years. This, it is true, was simply the opinion of the witness based on the condition of the framework at the time of the accident; but he, being a carpenter of 30 years' experience, was competent to testify on the subject, and hence the court could not have withdrawn the testimony from the jury. The defendant testified that during his 20 years' ownership of the property he visited it once a month to collect the rents, but made no examination of the grating himself and had no inspection made by anybody else. If the testimony of the other witnesses be believed, the wooden framework had decayed to such an extent as to be wholly insufficient to support the grating, thereby creating a defective covering of the hole which was a menace to every pedestrian who had occasion to use that part of the sidewalk. The evidence was sufficient to show that the defendant knew the condition of the covering over the hole if he had exercised the care required of him. He occupied a different position from that of the municipality. The owner has a primary duty to keep the sidewalk in a safe condition, while the duty of the municipality is secondary and supplemental, to see that the owner makes and maintains a safe pavement. *Lohr v. Philipsburg Boro*, 156 Pa. 246, 27 Atl. 133. The law charges a municipality with notice of a defect

if it has existed a sufficient length of time, to be observed by its officers exercising reasonable supervision. But notice should be imputed to the owner after the defect has existed for a much less time, because he gives the property his constant attention, and the defect is sooner discernible. We think the jury was right in finding that under the circumstances the defendant did know, or by the exercise of reasonable diligence could have known, of the defective covering over the hole in the sidewalk which caused the plaintiff's injuries.

Whether or not the defendant had actual knowledge was for the jury under the testimony submitted. He visited the premises at least once every month for 20 years to collect the rents. He says he "couldn't see anything wrong with it," implying that he did see the grating at least on some of his visits. O'Toole, a witness called by the defendant, was employed to lay a new pavement on the sidewalk, but had nothing to do with the grating or its support, and hence his testimony could not aid the jury in determining the condition of the iron grating and its wooden support. If the support was rotten and worthless at the time of the accident, and for several years prior thereto, as testified by the witness, the defendant saw it and permitted it to remain in the insecure condition, or was entirely incapable of making a proper inspection. In either case he, as owner of the premises, failed to perform the duty of a reasonably prudent man, and must accept the penalty which the law imposes for his negligence.

The question of the contributory negligence of the plaintiff is not before us. When she stepped aside to avoid the crowd, she was still on the pavement, and that act did not convict her of negligence. Under the evidence, she was on the sidewalk and where she had the right to be. She testifies that she was exercising care when she stepped toward the building. "Q. Were you using the care that you usually use when you walk on the sidewalk? A. I certainly was. I tried to be as careful as possible." The cover on the hole was apparently substantial and safe, and the plaintiff was not required to make a critical examination before stepping upon it. In the absence of knowledge to the contrary, she had the right to assume that it would support her weight. The request for binding instructions, therefore, could not have been granted on the ground that the plaintiff, by her negligence, contributed to her injuries. If the defendant desired further or more specific instructions as to plaintiff's negligence than the court had given, they should have been requested in points embodying the instructions desired. *Conner v. Traction Co.*, 173 Pa. 602, 34 Atl. 238; *Leary v. Traction Co.*, 180 Pa. 136, 36 Atl. 562.

The ninth assignment violates rule 31, and hence will not be con-

sidered. *Readdy v. Shamokin*, 137 Pa. 92, 20 Atl. 424; *Raymond v. Schoonover*, 181 Pa. 352, 37 Atl. 524. The sixth assignment must be dismissed, as there was evidence from which the jury could determine the plaintiff's expenses incurred by reason of her injuries, and there is nothing to show that they were unreasonable. The matters of practice complained of in assignments 7 and 8 are in substantial accord with the practice approved in *Fleming v. Dixon*, 194 Pa. 67, 44 Atl. 1064, and hence those assignments are not sustained. The judgment is affirmed.

LINDSAY ET AL. v. CECCHI.

[SUPREME COURT OF DELAWARE, JUNE 20, 1911.]

— Del. —, 80 Atl. 523.

Automobiles—Streets—Absence of License—Pedestrian—Injury—Negligence.

In absence of actual connection between the failure of the driver of an automobile to procure a license as required by statute, and an injury caused by the machine, the driver cannot be held liable in damages to a child who was injured by being struck by the automobile, although the operation of an automobile on the streets of a city by a person without a license from the secretary of state, is negligence *per se*.

Error to the Superior Court of Newcastle County, to review a judgment rendered in favor of plaintiff in an action to recover damages for injuries alleged to have been caused by being run into by an automobile. Reversed.

For plaintiff in error—Mr. James Saulsbury.

For defendant in error—Mr. Leonard E. Wales.

DECLARATION.

Nancy H. Lindsay, and Joseph Horace Lindsay, her husband, the defendants above named, were summoned to answer the plaintiff in this suit, in an action of trespass on the case; and thereupon the said plaintiff by Raffaello Cecchi, who is admitted by the court here to prosecute for the said plaintiff, Angelo Cecchi (who is an infant under the age of twenty-one years), as the next friend of the said Angelo Cecchi, complains:

CASE NOTE.

Use on Street or Highway of Automobile Without License.

- I. DRIVER OR OCCUPANT AS TRESPASSER, 88-92.
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I. Driver or Occupant as Trespasser.

Persons traveling or being transported upon a public highway in an automobile which has not been registered according to the requirements of statute, are not entitled to the rights of travelers lawfully upon a highway, and, therefore, are precluded from maintaining an action for the recovery of injuries sustained by collision with a railroad locomotive at a crossing, and are not entitled to take advantage of the statute which requires railroad companies to ring a bell or blow a

1. For that whereas, heretofore, at the time of the happening of the grievances hereinafter mentioned, to wit, on the Twenty-fourth day of March, A. D. 1909, the defendants above named were, and still are, lawfully married, domiciled together, and occupied the relation of husband and wife; that on the day and year aforesaid, at New Castle County aforesaid, the said Nancy H. Lindsay, the defendant above named, her said husband not being then and there personally present, so negligently and carelessly operated and drove a certain motor vehicle, commonly known as an automobile, that it ran into and struck against with great force and violence, the said Angelo Cecchi, the plaintiff above named, who was then and there in the exercise of due care and caution on his part, lawfully traveling upon a certain public street in the City of Wilmington, State of Delaware, to wit, on Sixth street, at or near its intersection with Tatnall street, in the City of Wilmington; and thereby, through the negligence and carelessness of the said defendant, Nancy H. Lindsay, the said Angelo Cecchi was knocked down, and one of the wheels of the said automobile passed over him, whereby the said Angelo Cecchi had his clavicle or collar bone broken and thereby also the said Angelo Cecchi was otherwise greatly bruised, wounded and injured, and also by means of the premises, the said Angelo Cecchi became and was sick, sore, lame and disordered, and so remained and con-

whistle for the protection of people at railroad crossings. "Under the decisions," said the court, "the operation of the unregistered automobile is deemed to be unlawful in every aspect of it. Everything in the conduct of the operator that enters into the propulsion of the vehicle is under the ban of the law. In going along the highway and entering upon the crossing the machine is an outlaw. The operator, in running it there and thus bringing it into collision with the locomotive engine, is guilty of conduct which is permeated in every part by his disobedience of the law, and which directly contributes to the injury by bringing the machine into collision with the engine. He is within the words of the statute. He is in no better condition to recover than a person would be who was violating the law by walking on the track of a railroad,

and struck by an engine when he had reached the crossing of the highway. Every minute of time, and every part of his movement, by walking upon the track of a railroad in approach to the crossing, he would be a violator of the law, and a trespasser. His unlawful act, in walking to that point and thus coming into collision with the engine, directly contributed to his injury, and would preclude him from recovering." *Chase v. N. Y. Cent. & H. R. R. Co.*, 208 Mass. 137, 35 L. R. A. (N. S.) 699 (1911).

On the theory that the passengers riding in an unregistered automobile are not travelers upon the highway, but are trespassers, it was held in *Feeley v. City of Melrose*, 205 Mass. 329 (1910), that there could be no recovery either for personal injuries sustained or for an injury to the car, caused by a defect in the highway, where, by

tinued for a long space of time, to wit, hitherto, during all of which said time, the said Angelo Cecchi suffered and underwent great pain, and was hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and also the said Angelo Cecchi was forced and obliged, and did then and there, pay, lay out and expend divers large sums of money in and about endeavoring to be cured of the wounds, fractures, bruises and injuries so received as aforesaid, and likewise incurred and became indebted for divers other sums of money for the purpose aforesaid; whereby the said Angelo Cecchi saith that he is injured, and hath sustained damage in the sum of One Thousand Dollars (\$1,000), and therefore he brings his suit, etc.

2. And also for that whereas, heretofore, to wit, at the time of the committing of the grievances hereinafter mentioned, to wit, on the Twenty-fourth day of March, A. D. 1909, at New Castle County aforesaid Nancy H. Lindsay, one of the defendants above named, then and there being the lawful wife of the said Joseph Horace Lindsay, co-defendant, in this cause, and domiciled and living with him, so negligently, carelessly and unskillfully ran or propelled a certain motor vehicle, commonly known as an automobile, over and along one of the public streets, in the City of Wilmington, in the county aforesaid, to wit, Sixth street, at or near its intersection with another public street, to wit, Tatnall street, in the City of Wilmington aforesaid, her said husband not being then and there personally present, at an unreasonable, dangerous, and excessive rate of speed, that the said automobile ran into and struck against with great force and violence, the said Angelo Cecchi, who was then and there lawfully upon and crossing over Sixth street aforesaid, from

statute, the operation of an unregistered automobile upon the public highway is forbidden. "If the automobile in which the female plaintiffs were riding was not registered according to the requirements of the law," said the court, "it was unlawfully upon the way; those who were using it were not travelers, but trespassers; and it would follow that they could not maintain this action. * * Each one of the plaintiffs must fail to recover in that event. It would not help the female plaintiffs that they may not have known that the automobile was not duly registered; they did not know that it was, and it was

at their own peril, as to the street and as to third persons, that they undertook to use a vehicle the use of which was prohibited by law."

It has been held that one who operates an automobile on a public highway in violation of a statute which forbids the operation thereon of unregistered automobiles, is not entitled to maintain an action against a street car company for personal injuries and injuries to the automobile which were merely the result of the failure of the street car company to use ordinary care, *Dudley v. Northampton St. R. Co.*, 202 Mass. 443, 23 L. R. A. (N. S.)

the northerly to the southerly side thereof, in the exercise of due care and caution on his part,—whereby the said plaintiff was, by the force and violence of said automobile running into and striking against him thrown and hurled to and upon the ground, and became and was thereby badly hurt, bruised, wounded and injured in various parts of his body, and thereby also, the right collar bone of the said Angelo Cecchi was broken, and the said plaintiff became and was sick, sore, lame, crippled, and disordered, and so remained and continued for a long space of time thereafter, to wit, for about four weeks, during all of which time, he, the said plaintiff, suffered and underwent great pain, and was hindered and prevented from performing and transacting his necessary and lawful affairs by him all that time to be performed and transacted, and was deprived of the society and comfort of his family, and also suffered great mental anguish. Wherefore, the said plaintiff saith that he is injured, and hath sustained damages to the amount of One Thousand Dollars (\$1,000), and therefore he brings his suit, etc.

3. And also for that whereas, heretofore, to wit, at the time of the committing of the grievances hereinafter mentioned, the defendant, Nancy H. Lindsay, was the lawful wife of, and domiciled with, the defendant, Joseph Horace Lindsay, at New Castle County aforesaid, and was operating and using a certain motor vehicle or automobile, in and upon the public streets of the City of Wilmington, in the county aforesaid; and whereas, it was the duty of the said defendant, Nancy H. Lindsay, to use said automobile, along and upon the public streets in the City of Wilmington aforesaid, so as not to run into and injure persons lawfully using and travelling upon the same, or otherwise imperil human life, yet the plaintiff avers that heretofore, on the Twenty-fourth day of March, A. D. 1909, the said

561 (1909). The court said: "The plaintiff as a mere trespasser on the highway was there not only against the right of the owner of the soil and was liable to an action by him, but also against the right of all other persons who were lawfully using the highway. He was violating the law made for their protection against him; accordingly he was a trespasser as to them. It follows that the defendant, which was lawfully using highways with its crossing, owed to the plaintiff no other or further duty than that which it would owe to any trespasser upon its property; that

is, not the duty of ordinary care, as those words are commonly used, but merely the duty to abstain from injuring him by wantonness or recklessness."

But the mere absence of proof that an automobile, which was injured by a defect in the highway, was registered and licensed as required by law, will not bar a recovery of damages for the injury so caused, on the theory that the plaintiff is presumed to have complied with the statute with respect to a license and registration. "If it appear affirmatively," said the court, "that he was traveling without a prop-

defendant, not regarding her duty in that behalf, her said husband not being then and there personally present, so negligently, carelessly, recklessly and unskillfully ran and operated the said automobile, and negligently omitted to give suitable, proper and timely warning or signal of the approach of said automobile, then and there being run northerly, along Tatnall street, and westerly along Sixth street, both being public streets in the City of Wilmington aforesaid, that it, the said automobile, with great force and violence, ran into and struck against the plaintiff, Angelo Cecchi, who was then and there in the act of crossing over from the northerly side of Sixth street, to the southerly side thereof, near its intersection with Tatnall Street aforesaid in the exercise of due care and caution on his part, and endeavoring to place himself in a position of safety; and by reason thereof, the said plaintiff was thrown and hurled with great force and violence upon the ground, and one of the wheels of the said automobile then and there passed over the body of the said Angelo Cecchi, and he became and was badly hurt, bruised, wounded and injured, and his clavicle or collar bone was broken and fractured, and he received a severe shock, jar and sprain, in and upon his side, back, hip, legs, thigh, and other portions of his body, and thereby also, the said plaintiff became and was sick, sore, lame, crippled, and disordered, and so remained for a long space of time thereafter, to wit, four weeks, during all of which time the said plaintiff suffered and underwent great pain, to wit, at New Castle County aforesaid. Wherefore the said plaintiff saith that he is injured, and hath sustained damage in the sum of One Thousand Dollars (\$1,000), and therefore he brings his suit, etc.

4. And also for that whereas, heretofore, at the time of the griev-

er registration of the vehicle, or without a license, it might well be held that he was not a traveler upon the highway in a legal sense, and that the town owed him no duty under the statute. * * * Inasmuch as the plaintiff was upon the road only as one riding in and operating an automobile, if it was unregistered and if he was unlicensed he had no relation to the highway and he was in no sense a traveler except as a violator of the law in reference to the use that might be made of the way. In regard to the right of recovery, his violation of this law would not be treated as mere evi-

dence of negligence that was not a direct and proximate cause of the accident, or as only a condition which was not fatal to his claims. * * * In cases somewhat analogous when one would avoid liability on the ground of the violation of law by the plaintiff he must prove the violation." *Doherty v. Inhabitants of Ayer*, 197 Mass. 241, 14 L. R. A. (N. S.) 816, 125 Am. St. Rep. 355 (1908). The statute passed upon by the court in this case is the same one construed by the court in *Dudley v. Northampton St. R. Co.*, 202 Mass. 443, 23 L. R. A. (N. S.) 561 (1909).

ance hereinafter complained of, the defendant, Nancy H. Lindsay, then and there being the lawful wife of and domiciled with the defendant, Joseph Horace Lindsay, operated and drove a certain motor vehicle or automobile, a machine which when being operated and driven upon the public roads and streets, greatly increased the danger to persons lawfully travelling upon and using the same, and which also requires skill and competency on the part of the person or persons engaged in operating such machine, and whereas, it was the duty of the defendant, Nancy H. Lindsay, in view of the premises, while using and operating the said automobile upon and along the public roads and streets, to exercise due care and caution and diligence to avoid and prevent accident and injury to the travelling public, and to have and obtain a license as an operator of a motor vehicle or automobile, in accordance with the statute in such case made and provided; yet the said defendant, Nancy H. Lindsay, not regarding her said duty in that behalf, heretofore, to wit, on the Twenty-fourth day of March, A. D. 1909, at New Castle County aforesaid, her said husband not being then and there personally present, negligently and carelessly undertook to, and did drive an automobile along and upon certain public streets, of the City of Wilmington aforesaid, to wit, Tatnall street and Sixth street, not being then and there duly licensed as an operator thereof, and sufficiently competent, careful or skillful to run and manage the same, and by reason thereof, as well as the incompetence, carelessness and unskillfulness of the said defendant in running and operating the car, on the day and year last aforesaid, at the county aforesaid, it ran into with great force and violence, struck against and knocked down the said Angelo Cecchi, who was then and there lawfully travelling upon and crossing over

II. Absence of Connection Between Injury and Want of License.

A. In General.

The following cases, including *LINDSAY V. CECCHI*, (Del. 1911), 80 Atl. 523 (the case annotated), are authority for the proposition that some actual connection between the violation of the statute requiring a license to operate an automobile upon the highway and the injury or damage complained of, must be shown in order to sustain an action for damages.

In an action to recover damages for

personal injuries from being run down by defendant's automobile, it was held in *Hyde v. McCreery*, 145 App. Div. 729, 130 N. Y. Supp. 269 (1911), to be error to permit the plaintiff to show that the defendant had failed to register his automobile and display the registration number, as required by a statute which provides, in effect, that no motor vehicle shall be used or operated upon public highways unless the owner shall have caused it to be registered in the office of the Secretary of State, and shall have the number assigned to it displayed on the back of

from the northerly side of Sixth street, to the southerly side thereof, at or near its intersection with Tatnall street aforesaid, in the exercise of due care and caution on his part, and endeavoring to avoid being struck by said automobile and by reason thereof, the said plaintiff became and was then and there greatly bruised, wounded and injured and his right collar bone was broken and fractured, and he received severe sprains and bruises on his back and other parts of the body, and also by means of the premises, said plaintiff became and was sick, sore and lame, and so continued for a long space of time thereafter, namely, for at least four weeks, during all of which time the said plaintiff was in the Delaware Hospital for treatment, and suffered and underwent great pain, and thereby also it became necessary to pay, lay out and expend a large sum of money in and about endeavoring to cure the said plaintiff of the pains, bruises, fractures, sickness, soreness, lameness and disorders occasioned as aforesaid, to wit, at New Castle County aforesaid. Wherefore the said plaintiff saith that he is injured, and hath sustained damage in the sum of One Thousand Dollars (\$1,000), and therefore he brings his suit, etc.

5. And also for that whereas, heretofore, to wit, on or about the Twenty-fourth day of March, A. D. 1909, at the time of the happening of the grievances hereinafter complained of, the said plaintiff, Angelo Cecchi, was lawfully in and upon a certain public street in the City of Wilmington, in New Castle County aforesaid, to wit, Sixth street, at or near its intersection with a certain other public street in said City, to wit, Tatnall street, in the exercise of due care and caution on his part, and while being so lawfully in and upon Sixth street aforesaid, a certain motor vehicle or automobile then and there being operated and driven at a high and dangerous rate of speed by the defendant Nancy H. Lindsay (lawful wife of, and domiciled with

the vehicle, where the failure to comply with the statute in no way contributed to the injury. The court said: "It will be observed that this statute does not purport to subject an owner of a motor vehicle to civil liability for injuries sustained while doing the prohibited act, and that there is nothing in the statute to indicate that it was intended to afford greater protection to the public. There are numerous cases where it was held that a jury may find negligence and a liability for injuries resulting from the doing of an act prohibited by statute; but in each of these

cases the statute was designed to prevent such injuries as were suffered by the individual claiming the damage, and the injuries were the direct or necessary result of the breach of the statute. Our attention has been called to no case where it was held that the mere doing of a prohibited act is *per se* proof of negligence on the part of the offender, and subjects him to a cause of action in favor of a private individual who had no interest in the observance of the statute. On the contrary, it seems to be well settled that with the duty imposed by a statute there

the defendant, Joseph Horace Lindsay) her said husband not being then and there personally present, in a careless, reckless and unskillful manner, and without any timely, sufficient or accurate warning being given of its approach, ran into and struck against the said plaintiff, who was then and there unaware of its approach, and without any opportunity to avoid the collision, and by means thereof, the said plaintiff was then and there struck with great force and violence by said automobile, knocked down, run over and greatly bruised, wounded and injured, and had his collar bone broken, and also by means thereof, he received severe sprains and bruises on his back and other portions of the body, and became and was sick, sore, lame, crippled and disordered and suffered and underwent great pain for a long space of time, wherefore, the said plaintiff saith that he is injured, and hath sustained damage in the sum of One Thousand Dollars (\$1,000) and therefore he brings his suit, etc.

6. And also for that whereas, heretofore, to wit, at the time of the committing of the grievances hereinafter mentioned, the defendant, Nancy H. Lindsay, was operating and using a certain motor vehicle or automobile owned and licensed by one Frank E. Patterson, the father of the said defendant, said owner and licensee not being an occupant of or directing or controlling the management and operation of the said automobile, and the defendant, Nancy H. Lindsay, was then and there the lawful wife of, and domiciled with the said defendant, Joseph Horace Lindsay, to wit, at New Castle

must be the correlative right in the person injured to have it discharged, to enable him to sue for a breach thereof. It cannot be claimed that the performance of the duties imposed by this statute afford greater protection to the public, or that the injuries to the plaintiff were the results of a failure to perform them. The danger of operating a motor vehicle is the same, whether it is registered or unregistered; and it is apparent that the unlawful act of the defendant did not in any sense contribute to the accident. The case is, therefore, not within the principle of the cases in which it has been held that the jury may find negligence and a liability for damages resulting from the doing of a prohibited act."

And, in an action to recover dam-

ages to an automobile which was struck by defendant's delivery wagon, it was held in *Shaw v. Thielbahr* (N. J.), 81 Atl. 497 (1911), that the failure of the plaintiff to prove that he had possession of a license at the time of the collision was not a ground for nonsuit. The court said: "The point is made by the appellant that the plaintiff produced a State license for 1911, whereas the accident happened in 1910. The contradicted proof, however, was that plaintiff had a license for 1910 which he had turned in to the department at the time of the trial. Moreover, the fact that the plaintiff was licensed at the time of the accident was not an essential part of his case, or even relevant to the issue as framed, since the possession of such a license has no tendency to avert

County aforesaid. And whereas, it was the duty of the said Nancy H. Lindsay, to use due care, caution and diligence, in the operation and management of the said automobile, along and upon the public roads and streets in said County, so as not to run into and injure persons lawfully using and traveling upon said public roads, and streets, or otherwise imperil human life and limb; yet the plaintiff avers that heretofore, to wit, on the Twenty-fourth day of March, A. D. 1909, the said Nancy H. Lindsay, not regarding her duty, in that behalf, her said husband not being then and there personally present, negligently, carelessly, recklessly and unskillfully ran and operated the said automobile upon and along a public street, to wit, Sixth street, in the City of Wilmington, in New Castle County, aforesaid, at or near its intersection with a certain other public street, to wit, Tatnall street, in said city, without giving any suitable, proper or timely warning of the approach of said automobile, and also without using proper effort and due diligence in bringing said automobile to a standstill or in slackening the speed of same, after discovering the presence of the said plaintiff, Angelo Cecchi, who was then and there lawfully in and upon Sixth street, aforesaid, at or near its intersection with Tatnall street, aforesaid, in the exercise of due care and caution on his part; and by reason of the negligence and carelessness of the said Nancy H. Lindsay, in the management and operation of the automobile as aforesaid, it, the said automobile, was driven into

collision as do brakes, signal trumpets, and lighted lamps at night. The duty created by the police regulation to have a license and to display its number is not owing to the defendant or created for his benefit, at least as far as the avoidance of accident is concerned. * * * What is gained by the display of a license number is, not the avoidance of collisions, but the more ready identification of the machine, and its responsible owner. To the argument that the absence of its means of identification had the tendency to make the plaintiff less careful, the answer is that such a consideration is too remote to be relevant to the legal meaning of that term, which is derived, not by the strict process of logic, but from the exigencies of trial by jury."

It was held in *Hemming v. City of New Haven*, 82 Conn. 661, 25 L. R. A.

(N. S.) 734 (1910), that the failure of the operator of an automobile to comply with a statute requiring, under penalty, the registration of automobiles, but which does not declare unlawful the use of unregistered automobiles on the highways, does not preclude such owner from the right to recover of a city for an injury to his machine caused by an excavation negligently permitted to exist in the highway. The court said: "The plaintiff was violating the statute relating to the registration of automobiles, but that fact does not relieve the defendant. This statute imposes an obligation upon the plaintiff to register his automobile and for its violation prescribed a penalty. The statute goes no further, and it cannot be held that the right to maintain an action for damages resulting from the omission of the defendant to perform the public duty is

and upon the said plaintiff, and the said plaintiff was thereby struck and hurled with great force and violence, and knocked down, and one of the wheels of the said automobile ran over him, and his clavicle or collar bone was broken and fractured, and he received a severe shock, jar and sprain, in and upon his arms, side, back, chest and other parts of his body, and thereby also, he became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, four weeks, and suffered and underwent during said time, great pain, and it became and was necessary for said plaintiff to be treated for his injuries at the Delaware Hospital, and thereby also, the said plaintiff lost and was deprived of the comfort and society of his family, and also suffered great mental anguish, wherefore he saith that he is injured, and hath sustained damages to the amount of One Thousand Dollars (\$1,000), and therefore he brings his suit, etc.

DEFENDANT'S PLEAS.

Not guilty; Release; Act of Limitations.

CONRAD, J. This action was brought in the court below by Angelo Cecchi, an infant, by his next friend, Raffaello Cecchi, against the defendants, Nancy E. Lindsay and Joseph Horace Lindsay, her husband, to recover damages for personal injuries which the plaintiff alleges he sustained by reason of being run into, knocked down and injured by an automobile driven and operated by Nancy E. Lindsay, one of the defendants, on the 24th day of March, A. D.

taken away because the person injured was, at the time his injuries were sustained, disobeying a statute law, which in no way contributed to the accident. A traveler with an unregistered and unnumbered automobile is not made a trespasser upon the street, neither did it necessarily follow that the property which he owned is outside of legal protection when injured by the unlawful act of another. * * * The registration of the plaintiff's machine was of no consequence to the defendant. His failure to register and display his number in no way contributed to cause the injury. The accident would have happened if the law in this respect had been fully observed. The plaintiff's unlawful act was not the act of using the street, but in making a lawful use

of it without having his automobile registered and marked as required by law."

B. Want of Chauffeur's License.

In the absence of a chauffeur's license, which is required by a statute providing that "No person shall operate an automobile or a motor cycle for hire, unless specially licensed by the commission so to do," though made punishable by other provisions of the statute, does not render the operator and those with him trespassers upon the highway; and in an action for personal injuries and damage to an automobile caused by a collision with another automobile driven upon the highway in the opposite direction, the fact that the defendant was thus viola-

1909, near the intersection of Sixth and Tatnall streets in the city of Wilmington.

The plaintiff was a child about six years of age. The narr. of the plaintiffs alleges among other things as acts of negligence that the driver or operator of the automobile had no proper license as required by the Act of Assembly in that behalf.

The plaintiff had a verdict, the defendant having excepted to the charge of the court to the jury. The assignments of error are based upon the charge of the court.

The main point raised by the assignments of error is: Did the court below err in its instructions to the jury regarding the law governing the issuing of licenses to persons operating automobiles in this state?

The court below charged the jury in part as follows:

"This action is based on negligence, which has been defined to be the want of ordinary care; that is, the want of such care as a reasonably prudent and careful person would exercise under similar circumstances. With respect to the matter of negligence we may say to you that certain things are, or amount to, negligence in law, whether any active or positive negligence be proved or not. By the laws of this State it is provided that no person shall operate a motor vehicle upon the public streets, roads, turnpikes, or highways of this State, unless he has first obtained from the Secretary of State a license. The violation of this law is negligence *per se*, that is, an act of negligence it-

ting the statute is only evidence of his negligence in reference to his fitness to operate the car and to his skill in the actual management of it. The court said: "The operating of the automobile in itself is unobjectionable. The illegal element in the act is the failure to have a license. The purpose of the requirement of a license is to secure competency in the operator. If in any case the failure to have a license, looking to those conditions that ordinarily accompany the failure to have it, is a cause contributing directly to an injury, a violator of the law would be legally responsible to another person injured by the failure; or, if he is injured himself, would be precluded from recovery against another person who negligently contributed to the injury.

We are of opinion that his failure in that respect is only evidence of negligence in reference to his fitness to operate a car, and to his skill in the actual management of it, unless in the case of the plaintiff, it is shown to be a contributing cause to the injuries sued for, in which case it is a bar to a recovery. * * * If the illegal quality of the act had no tendency to cause the accident, the fact that the act is punishable because of the illegality, ought not to preclude one from recovery for harmful results to which, without negligence, the innocent features of the act alone contributed." *Bourne v. Whitman*, 209 Mass. 155 (1911). The other part of the same statute, which provides that no person shall "operate an automobile or motor cycle upon any public

self, and renders the wrongdoer liable for an injury resulting from such misconduct.

"The defendants admit that the operator of the machine did not have in her possession at the time of the accident the license required, but insist that she had on the morning of the accident, and prior thereto, made the required affidavit to procure such a license, and had, therefore, complied with the law. We say to you, however, that the mere application for a license, or the making of the required affidavit would not meet the requirements of the statute. * * *

"Now, gentlemen, if you believe from the evidence that the injuries to the plaintiff were caused by the negligent running and operation of the machine by Nancy E. Lindsay, one of the defendants, and that the plaintiff was free from any negligence that contributed to the accident, your verdict should be in favor of the plaintiff. Or if you believe that the said defendant was operating the machine without a license from the Secretary of State, this would amount in law to negligence, and if the plaintiff was free from any negligence that contributed to the accident, your verdict should be in favor of the plaintiff; otherwise you should find for the defendant."

The general principle is well settled that any person, violating a law prohibiting the act in connection with which injury results to another person, is guilty of negligence *per se*, but in this State and elsewhere the courts have very uniformly held that there must be a causal relation between the violation of a statute and the injury, to render the defendant liable.

The court below in its charge to the jury did not qualify or explain that the failure to procure a license must have contributed to the accident, but simply state as the law that "the violation of this (license) law is negligence *per se*, that is, an act of negligence itself,

highway or private way laid out under authority of statute unless authorized to do so under the provisions of this Act," the court said, has been construed differently. In commenting on the decision rendered in *Dudley v. Northampton St. R. Co.*, 202 Mass. 443, 23 L. R. A. (N. S.) 561 (1909), the court said: "Because of the peculiar provisions of the statute and the dangers and evils that it was intended to prevent, it was decided, after much consideration, that the having of such a machine in operation on a street, without a license, was the very

essence of the illegality, and that the illegality was inseparable from the movement of the automobile upon the street at any time, for a single foot; that in such movement the machine was an outlaw, and any person on the street as an occupant of the automobile, participating in the movement of it, was for the time being a trespasser. Some of us were disinclined to lay down the law so broadly, and the opinion of the court was not unanimous; but the doctrine has been repeatedly reaffirmed and is now the established law of the Com-

and renders the wrongdoer liable for an injury resulting from such misconduct," and at the close of the charge the court says:

"If you believe that the said defendant was operating the machine without a license from the Secretary of State, this would amount in law to negligence, and if the plaintiff was free from any negligence that contributed to the accident, your verdict should be in favor of the plaintiff."

Beginning with the case of *Ferris Giles v. Diamond State Iron Co.*, 7 Houst. 466, 13 Am. Neg. Cas. 772, 8 Atl. 368, decided in 1887, the courts in this State, whenever they have had occasion to charge regarding the violation of a statute or ordinance constituting negligence *per se*, have stated that there must be a causal relation between the violation of the law and the injury complained of.

See, also, *Robinson v. Simpson*, 8 Houst. 398, 32 Atl. 287; *Jones v. Belt*, 8 Houst. 562, 32 Atl. 723; *Carswell v. Wilmington*, 2 Marv. 360, 43 Atl. 169; *Knopf v. P., W. & B. R. R. Co.*, 2 Pennewill, 392, 8 Am. Neg. Rep. 345, 46 Atl. 747; *Winkler v. P. & R. R. Co.*, 4 Pennewill, 80, 13 Am. Neg. Rep. 147, 53 Atl. 90; *MacFeat v. P., W. & B. R. Co.*, 5 Pennewill, 52, 62 Atl. 898.

It is evident from a careful reading of the testimony found in the record in this case that there was no possibility of causal connection between the absence of the license and the injury to the plaintiff.

Possession of a license did not insure or even tend to show skill on the part of the operator, therefore the absence of a license did not show the contrary.

Whether she had a license or not was therefore clearly immaterial to the question of her negligence towards the plaintiff, and the jury should have been so instructed.

The judgment of the court below is therefore reversed, and the case remanded for retrial.

monwealth. Feeley v. City of Melrose, 205 Mass. 329 (1910); *Chase v. N. Y. Cent. & H. R. R. Co.*, 208 Mass. 137, 158, 35 L. R. A. (N. S.) 699 (1911). The difference between this provision of the statute and that involved in the present case is in part one of form, but in connection with the form, it is still more the seeming purpose and intent of the Legislature as to permitting such machines upon the public ways without adequate means of identifying them and ascertaining their owner, together with the requirements that the machine

itself, as a thing of power, shall have its own registration and legalization, the evidence of which it shall always carry with it. * * * We are of opinion that the law of these last cases should not be extended to the provision of the statute requiring every operator to have a personal license to operate the car. The jury should have been instructed that the defendant's failure to have a license was only evidence of his negligence as to the management of the car."

GASKINS v. HANCOCK.

[SUPREME COURT OF NORTH CAROLINA, SEPTEMBER 27, 1911.]

156 N. C. 56.

1. Damages—Automobile—Personal Injury.

Compensatory, and not punitive, damages should be awarded to one who is injured when his team took fright at an approaching automobile which the operator failed or was unable to stop promptly on signal.

2. Automobiles—Highways—Care.

The owner of an automobile is required to take notice that such machines are liable to scare horses along the highway and to keep a proper lookout not to cause injury to others avoidable by proper care in the use of his machine.

Appeal by defendant, H. S. Hancock, from a judgment of the Superior Court of Craven County, rendered in favor of plaintiff, W. S. Gaskins, in an action brought to recover damages caused by his team taking fright at defendant's automobile. . Affirmed.

For appellant—W. D. McIver.

For appellee—E. M. Green. and Guion & Guion.

COMPLAINT.

The plaintiff complaining of the defendant alleges:

1. That the plaintiff resides in Craven County, across Neuse river on a farm in No. 2 township.
2. That on the 14th day of July, 1909, the plaintiff was on Neuse river bridge going across to his home in No. 2 township driving a team of mules hitched to a lumber wagon. A negro man named John Willis was riding on the rear axle, while plaintiff was driving said team seated on the hounds of the wagon.
3. That defendant, Harrison S. Hancock, with a party of friends was riding across Neuse river bridge in an automobile controlled and managed by the said defendant, Harrison S. Hancock, coming to New Bern from across the river and meeting the plaintiff driving his team of mules drawing a wagon.
4. That defendant was driving his automobile at a great speed.

NOTE.

On the subject of Injury to Person Caused by Fright of Horse, see note in 14 Am. Neg. Rep. 651.

And see note on Liability for Personal Injuries Caused by Horse Taking Fright at Noise of Automobile, in 1 N. C. C. A. 107-118, *post*.

5. That the defendant negligently drove the said automobile at a greater speed than it could safely be managed and controlled by him in crossing bridges, and much greater than that limited by law for automobiles in crossing bridges.

6. That defendant's automobile was of the kind propelled by the explosion of gas, making a great noise.

7. That the bridge across Neuse river is perfectly straight and defendant could see, and did see, the plaintiff's team of mules drawing a wagon crossing said bridge coming toward him.

8. That for quite a distance away the defendant could have seen the plaintiff's team, and he is informed and believes and alleges that he did see the plaintiff's team coming toward him as aforesaid, and that defendant was perfectly aware of the great danger to team and driver meeting an automobile on a comparatively narrow bridge of a mile in length, such as said Neuse river bridge.

9. That plaintiff is informed and believes and alleges that at quite a distance away defendant observed that plaintiff's team was frightened by the automobile in the manner in which it was being driven, controlled and managed, and saw that the plaintiff was trying desperately to quiet and keep the team from plunging through the guard rail of the bridge into the river below.

10. That, seeing that defendant made no effort to slow down or stop the machine, after observing the frightened team and the peril of the plaintiff, John Willis riding on the rear of plaintiff's wagon called loudly and repeatedly, and holding up his hand as a signal, for defendant to stop his machine, but the defendant paid no attention, nor did he stop the machine until he had come up to and passed the plaintiff and his team.

11. Plaintiff is informed and believes, and alleges that after the defendant had noticed that the team was frightened and could not be controlled by the plaintiff, he had ample time to have reduced his speed and stopped his machine, but instead negligently and wilfully continued at the same high rate of speed until he came up to and met the plaintiff, not stopping the machine until he had reached some distance beyond him.

12. That when plaintiff saw defendant paid no attention to the calls to stop but came on with great and undiminished speed, plaintiff attempted to rise and get out to the heads of the frightened team to prevent their plunging through the guard rail of the bridge into the river, but before he could rise the automobile was upon him, and the plaintiff was thrown violently from the wagon to the floor of the

bridge under the wheels of the wagon, and while lying bruised and bleeding on the bridge, the wagon, drawn violently by the now maddened and runaway team, passed completely across and over the prostrate body of the plaintiff about the small of the back, probably doing great internal injury, plaintiff being an old man over sixty years of age.

Whereby plaintiff was greatly injured, and by reason of the shock and bruises and injury to his back, was made sick, compelled to have the attendance of a physician, and is injured in his general health so that until now he has not recovered, and is advised that his injury is permanent to his great damage in a great sum, to-wit: Five Thousand Dollars (\$5,000.)

Wherefore plaintiff prays for judgment for Five Thousand Dollars damages, the costs of this action and for such other and further relief as to the court he may appear to be entitled.

ANSWER.

The defendant answering the complaint of the plaintiff, alleges:

4. That the allegations of the fourth paragraph of the complaint are untrue and are denied.

5. That the allegations of the fifth paragraph of the complaint are untrue and are denied, and defendant further alleges that he was not going at a rate of more than four and one-half miles an hour.

6. That the allegations of paragraph six are untrue and are denied, except that defendant admits that his automobile was driven by an internal combustion engine, which combustion derived its power from the quick expansion of the burned gases, but it is expressly denied that this produced a great noise.

8. That the allegations of paragraph eight of the complaint are untrue as therein alleged, but the truth of the matter is as follows: In crossing the bridge, driving his automobile, the defendant kept a lookout and saw the wagon approach, but the width of the bridge is such that it was entirely without danger; that the automobile and the wagon could pass without danger. Defendant kept to his right and plaintiff kept to his right, and they could have passed without danger at all, the one to the other.

9. That the allegations of paragraph nine are untrue and denied, and it is further alleged that defendant saw no evidence of fright on the part of the mules driven by plaintiff, until he was within about forty feet of said team.

10. That the allegations of paragraph ten of the complaint are

untrue according to defendant's best knowledge, information and belief, and does further allege that if any calls or signals were given as alleged therein, defendant did not see the same, though he was looking ahead and on the lookout for the safety of himself, the lady and child who were with him.

11. That the allegations of paragraph eleven of the complaint are untrue as therein alleged, but defendant avers that he had no notice of any fright on the part of the plaintiff's team until he was within forty feet of them; that he was running at a speed of less than five miles an hour; that the first he noticed of the fright of the mules was when they attempted to turn to plaintiff's left into the right of way of defendant; that had he stopped his machine suddenly the passengers sitting with him would probably have been thrown out and under the feet of the team,—a lady and a child—while by continuing his course he could pass the head of the mules and avoid danger to the lady and the child and leave a free passage for plaintiff's team. To have attempted to stop meant a collision between the automobile and the mules which must have been disastrous to all parties. As soon as he passed the heads of the mules defendant stopped his machine just behind the wheels of the wagon which, in defendant's judgment was the safest course for plaintiff, himself, the lady and child, as well as for the mules driven by plaintiff.

12. That defendant has no sufficient knowledge, information or belief as to the allegations contained in paragraph twelve of the complaint, and therefore, denies the same.

And for a further defense defendant alleges:

13. That if plaintiff was injured as alleged, his injury arose by his own negligence to which he contributed in this:

14. That plaintiff was driving the mules, near to and in control of them and had the best opportunity to know when they showed fright or became frightened at the approach of defendant; that he could easily have stopped his team upon their first show of fright, and stopping them, gone to their heads and avoided any injury, thus giving the defendant notice of the fact that his team was frightened so that defendant could have stopped his machine and allowed the plaintiff to pass.

15. That even without stopping his team and giving defendant notice of the danger, plaintiff further contributed to his own injury by attempting to dismount from his wagon, after his team had become frightened, whereas if plaintiff had retained his seat upon the wagon until defendant had passed their heads he could have turned

into a free track across the bridge, and would have been carried away in safety.

Wherefore, defendant prays that he go without day and recover his costs.

CLARK, C. J. According to plaintiff's evidence, he was driving a pair of mules across Neuse river bridge, a structure about a mile in length and 18 feet wide, perfectly straight. A few yards ahead when he first drove upon the bridge the defendant was crossing the bridge in an automobile, and when plaintiff had crossed probably one-half of the bridge, going at the rate of about three miles an hour, he saw defendant returning and coming towards him at a rate of speed of about ten miles an hour. His mules showed signs of fright, whereupon the negro riding with him on the back of the cart, at the direction of the plaintiff, signaled and called to the defendant, when at a distance of about 40 yards, requesting him to stop his machine. He came on, and, the mules becoming uncontrollable, plaintiff, an old man, was thrown to the floor of the bridge under the mules' feet, and the two wheels of the double horse wagon, with the negro on the rear, passed over and across the small of his back, from which injury he sustained great suffering, and for several months was disabled to labor.

There was conflicting evidence as to the distance at which the plaintiff signaled the defendant, and also the speed at which the automobile was traveling. The defendant's evidence put the speed at less than five miles an hour, while the plaintiff's witnesses placed it at more than that. The defendant's testimony was that he could not have stopped his machine sooner without injury to occupants.

The judge read to the jury the statute regulating the operation of moving vehicles in the use of highways (Laws 1909, c. 445, §§ 9, 10, 11, 12), and gave a careful charge in accordance therewith, applying the law to the various phases of the facts as they might be found by the jury, in which charge we find no error.

The exception as to the form of the issues cannot be sustained, as upon them every phase of the controversy could be, and was, fairly submitted to the jury. *Humphrey v. Church*, 109 N. C. 137, 13 S. E. 793, and cases there cited. The exceptions of the defendant are largely addressed to the refusal of the court to grant a nonsuit and refusal to instruct the jury to answer each of the issues, *seriatim*, in favor of the defendant. In refusing to do so there was no error. The case is almost entirely one of fact, and was properly submitted to the

jury, who evidently gave a moderate verdict. The judge cautioned them very properly that they were to give only compensatory damages, and nothing by way of punishment.

He also instructed them that an automobile is not a nuisance in itself, and that it was not negligence *per se* for a person to use one in traveling along public highways and across public bridges, and that the owner is liable for damages only when caused by his negligence, that he is required to take notice that such machines are liable to scare horses along the highway, and he should keep a proper lookout not to cause any injury to others which could be avoided by proper care in the use of his machine. No error.

BROWN ET AL. V. THORNE.

[SUPREME COURT OF WASHINGTON, DECEMBER 2, 1911.]

61 Wash. 18, 111 Pac. 1047.

1. Automobiles—Highways—Fright of Horse—Noise—Special Verdicts—Consistency

In an action to recover damages for personal injuries sustained by a woman whose horse was frightened by the alleged excessive speed and loud noise of an automobile, and the failure of the operator of the car to stop his machine on signal, a general verdict found in favor of the plaintiff is not inconsistent with a special verdict of "noise, appearance, and excessive speed of an automobile," found in answer to the question as to what caused the fright of the horse, and a special verdict of "Yes. Sudden appearance as it came into sight at high speed," found in answer to the question whether it was the appearance or the noise of the automobile which caused the fright.

2. Automobiles—Stopping—Fright of Horse—Statute.

The operator of an automobile must, under Rem. & Bal. Code, section 5570, stop the forward motion of the car to avoid frightening horses, if requested by the driver by signal or otherwise, and must not go on unless the horses are under control, or it is necessary to avoid accident or injury to himself.

3. Negligence—Verdict—Failure to Prove All Charges.

The verdict in a negligence action will not be set aside because of the insufficiency of the evidence to sustain some of the charges of negligence, if the verdict is sustained as to any one charge.

Appeal by defendant from a judgment of the Superior Court of Pierce County, rendered in favor of plaintiffs, in an action to recover damages for personal injuries caused by a horse taking fright at the negligent operation of an automobile. Affirmed.

CASE NOTE.**Liability for Personal Injuries Caused by Horse Taking Fright at Noise of Automobile.****I. DUTY AND LIABILITY IN GENERAL, 107.****A. CHARACTER OF NOISE, 108.****B. CRANKING MACHINE, 113.****II. STATUTORY REQUIREMENTS, 115.****III. EVIDENCE AS TO NOISE, 117.****IV. PROTECTION OF OCCUPANTS OF AUTOMOBILE, 118.****I. Duty and Liability in General.**

It is a matter of common knowledge that horses, however well trained, are

often made restive, if not considerably frightened by the approach of automobiles, especially if they are run at a high rate of speed, or if the operation of the machine is attended by loud or explosive noises and with the emission of acrid and disagreeable odors. The person who operates a motor vehicle is presumed to be aware of these mechanical conditions, and upon approaching a horse driven along the street he must, very often, not only stop the forward motion of the car, but stop the engine as well, in accordance with the rule of the common law which requires every traveler to use ordinary care to prevent or avoid

For appellant—Hayden & Langhorne.

For respondents—Anthony M. Arntson.

COMPLAINT.

The plaintiffs, Frances R. Brown and Millard F. Brown, her husband, complain of the defendant, Chester Thorne, and alleges:

A. That at all the times hereinafter mentioned they were and that they now are husband and wife.

I. That on or about the 20th day of March, A. D. 1909, the plaintiff Frances R. Brown was driving a horse, hitched to a buggy in which she was riding, in a southerly direction on a public highroad, highway or street known as Pacific Avenue, towards the intersection of said avenue with the highroad, highway or street sometimes known as the Wilson Road, said intersection being within the limits and thickly settled and business portion of the village known as Fern Hill, sometimes known as East Fern Hill, within the County of Pierce, State of Washington.

II. That as said plaintiff, Frances R. Brown, riding in said buggy and driving said horse, as aforesaid, reached a point in said Pacific Avenue from about 100 to 130 feet north of said intersection, the defendant operated and drove a large automobile, or motor-vehicle, having a large top, raised, and a large wind-guard at the front thereof, and using gasoline as motive power, the same being then and there in charge of and under the control of said defendant and owned by him, rapidly upon and along said Wilson Road, in an easterly direction toward said intersection, and around the corner at said inter-

inflicting injury upon another traveler. *Trombley v. Stevens-Duryea Co.*, 206 Mass. 516 (1910).

A. Character of Noise.

The right of the operators of motor vehicles to the use of the highway has never been denied, but in their use of the highway they must exercise reasonable caution for the safety of others; in determining the degree of care required, the noises made by the running of the motors must be considered as well as the speed, size and appearance of the cars. *House v. Cramer*, 134 Iowa, 374, 10 L. R. A. (N. S.) 655 (1907).

Injury resulting from a horse being frightened at the ordinary noise of an automobile cannot be made the basis of a recovery, since it is a well established rule of law that the right to operate a motor car upon a public street or highway, carries with it the right to make the noises incident to the lawful and proper operation of the car. *Eichman v. Buchheit*, 128 Wis. 385 (1906); *Brown v. Thorne* (the case annotated), 61 Wash. 18, 111 Pac. 1047 (1911); *House v. Cramer* 134 Iowa, 374, 10 L. R. A. (N. S.) 655 (1907); *Simmons v. Lewis*, 146 Iowa, 316 (1910); *Nason v. West*, 31 Misc. 583, 65 N. Y. Supp. 651 (1900).

section, and upon and along said Pacific Avenue in a northerly direction toward and past said plaintiff, Frances R. Brown, and said horse, which was headed toward the south, as aforesaid.

III. That for some time before said automobile reached said intersection, and at all times after said automobile reached said intersection until the happening of the accident hereinafter described the plaintiff, Frances R. Brown, and said horse and buggy were plainly visible to the defendant, and were seen by him to be approaching said intersection on said highway, or would have been so seen by him had he exercised any precaution or care for the safety or protection of said plaintiff; that under the circumstances, as herein described, it was the duty of the defendant to operate, manage and control said automobile in such manner as to exercise every reasonable precaution to prevent the frightening of said horse and to insure the safety and protection of said plaintiff, Frances R. Brown, but that the defendant wholly failed to perform his said duty, as herein stated.

IV. That before or at the time of turning said corner, as aforesaid, said defendant cut out or disconnected the "muffler," so called, on said automobile, and rapidly approached the plaintiff, Frances R. Brown, and said horse, as aforesaid, at an excessive rate of speed, to-wit, at a rate of speed faster than one mile in $2\frac{1}{2}$ minutes, and constantly increasing, with the engine on said automobile emitting a rapid series of loud and unusual explosive or puffing sounds.

V. That the defendant observed, or by the exercise of reasonable care would have observed the plaintiff, Frances R. Brown, and said horse and vehicle approaching on said highway, as aforesaid, in ample time to have connected said "muffler," and discontinued said

"Automobiles are constantly driven along streets past horses without frightening them," said the court in *O'Donnel v. O'Neill*, 130 Mo. App. 360 (1908), "and if the appearance and movement of a particular automobile and the noise incident to its operation are in no way unusual, it is not, *per se*, a wrongful act to operate it in proximity to a horse so long as the horse exhibits no fright."

So, the fact that the noise produced was greater than that of an automobile running on high gear, but not greater than that usually produced by a one-cylinder car running at low gear, does

not warrant a recovery, when the driver of the horses gave no signal and there was nothing to lead the operator of the car to believe that the horses would be frightened. *Simmons v. Lewis*, 146 Iowa, 316 (1910).

But the rule, as stated in the preceding paragraphs, without a proper limitation, would indeed be dangerous to the rights of a driver of a vehicle drawn by horses. If the operator of a machine knows, or in the exercise of reasonable prudence, ought to know that the noise of his machine has excited a horse so as to render it unmanageable, it is his duty to stop the ma-

explosions, and to have brought said automobile to a stop, and thus avoided frightening said horse, and prevented the accident and injury herein described.

VI. That as said automobile, so operated, managed and controlled as aforesaid, swung into said Pacific Avenue, and into the view of said horse, said horse became excited and frightened by its sudden appearance, and the high rate of speed at which it was moving, and by said sounds, and reared and plunged in a manner clearly indicating its fright; that the frightened condition of said horse was then seen by the defendant, or would have been seen by him had he exercised any precaution or care as required by the circumstances in ample time to have connected said "muffler," and discontinued said explosions, and to have brought said automobile to a stop before said horse became unmanageable, and thus have prevented the accident and injury herein described; but that the defendant carelessly and negligently failed to reduce the speed of said automobile, or to use said muffler or to stop said loud puffing or to operate, manage or control said automobile in a proper or careful manner, and failed to exercise any precaution whatever to prevent the frightening of said horse or to tend to insure the safety or protection of the plaintiff, Frances R. Brown.

VII. That thereupon the plaintiff, Frances R. Brown, signaled the defendant to stop, by arising to her feet in the buggy, and waving her arm above her head, and calling loudly to him to stop; but that, negligently disregarding said signals, the defendant continued to operate said automobile toward and past the said plaintiff and said horse, at a high and increasing rate of speed, and with the said

chine, for a machine is always presumed to be under the control of the operator. *BROWN v. THORNE* (the case annotated), 61 Wash. 18, 111 Pac. 1047 (1911); *House v. Cramer*, 134 Iowa, 374, 10 L. R. A. (N. S.) 655 (1907).

To allow explosions from the engine of an automobile while the machine is standing for a brief stop not far from the point where a team of horses is hitched, is not negligence, unless the operator of the car sees or by the use of reasonable care might see that the horses were frightened thereby; then a failure to stop the explosions and thereby avoid an accident becomes negligence. In this case the issue was sub-

mitted to the jury. *House v. Cramer*, 134 Iowa, 374, 10 L. R. A. (N. S.) 655 (1907).

The running of a motor which was described on the trial as giving forth "much noise and caused the whole machine to vibrate," was apparently made the basis of recovery in *Rochester v. Bull*, 78 S. C. 249, 58 S. E. 766 (1907). In this case the facts showed that the plaintiffs were driving along the highway in a wagon drawn by a mule and as they drew near a bridge leading over a creek they saw an automobile just about to leave the bridge. The driver of the wagon at once signaled the operator of the car to stop

muffler still cut out or disconnected, and with a continuation of said loud explosive or puffing sounds.

VIII. That from the time said automobile swung around said corner, as aforesaid, to the time of the accident herein described, said horse was frightened and unmanageable, said condition resulting wholly by reason of the appearance, speed and loud puffing of said automobile, as aforesaid, and that said condition of said horse was clearly apparent and known to the defendant, or would have been known to him had he exercised any reasonable precaution or care in the operation or management of said automobile.

IX. That the defendant observed and understood, or by the exercise of reasonable care would have observed and understood said signal given by said plaintiff, as aforesaid, in ample time to have connected said "muffler," and discontinued said explosions, and to have brought said automobile to a stop before said horse became unmanageable, and so have prevented the accident and injury herein described.

X. That after the giving of said signal, as aforesaid, further movement of said automobile toward said horse was not necessary to avoid accident or injury, or otherwise, but that on the contrary such further movement caused the accident and injury herein described and that at no time after said automobile swung around said corner did said horse appear to be under the control of its driver, the plaintiff, Frances R. Brown.

XI. That after giving said signals, as above described, the plaintiff, Frances R. Brown, fearing that said horse would throw her by its plunging and bucking, jumped from the buggy and attempted to reach the horse's head, for the purpose of controlling it; that as

The road at this point was down a comparatively steep grade and narrow; on the left hand side, approaching the bridge, was a steep bank, and on the other side a steep bluff leading down to the creek. In compliance with the signal the operator of the automobile ran his car into a "cut out" in the bank on the left-hand side of the road and stopped the forward motion of the machine. The motor, however, was permitted to run, and according to the testimony "gave forth much noise and caused the whole machine to vibrate." The plaintiffs continued their approach, the mule becoming more or less fright-

ened as he neared the machine; when he was about opposite the car, he became unmanageable and ran into a telegraph pole, throwing the occupants of the wagon to the ground, thereby causing personal injuries. The court said that the character of the ground, the exposed situation of the plaintiffs, and their little children, the fright of the mule, the noise of the machine, were all circumstances requiring the exercise of such care as a prudent person would use, and the question was one for the jury, and the court therefore held that a nonsuit was properly refused.

she stood upon the ground, by the side of the buggy, with the automobile still approaching, the horse plunged violently, and jerked the buggy against said plaintiff, Frances R. Brown, knocking her down and striking her head against a stone, and dazing or stunning her, whereupon the horse started to run, and swung across said avenue, dragging the said plaintiff upon the ground.

XII. That said fall and dragging, above described, severely and painfully bruised and injured the head, neck, and entire left side of said plaintiff, Frances R. Brown, and injured the drum and other parts of her left ear, and severely shocked her nervous system; and also lacerated and tore loose the tissues connecting the uterus with the peritoneum, as a result of which latter injury the tissues surrounding said parts last above described became highly inflamed, necessitating said plaintiff's submission to an extremely painful and dangerous operation, by which the uterus and left ovary were removed.

XIII. That at the time of said accident above described the plaintiff, Frances R. Brown, was a strong, healthy, robust and active woman of the age of thirty-eight years; but that as a result of said injuries, and the effects of the said operation necessitated thereby, as above described, the said plaintiff's nervous system has been permanently injured, and her strength, bodily functions and hearing permanently impaired, and that she has at all times since said accident suffered, and still suffers, and during the balance of her life will continue to suffer great physical and mental pain and anguish, all as the result of the defendant's carelessness and negligence, as aforesaid

It is often impossible to determine whether the horse became frightened at the appearance of the automobile, its operation at high speed or the noises produced. In one case it was remarked that courts and juries do not possess sufficient "horse sense" to determine whether the horse took fright at the excessive speed of a car which gave forth an unusual noise, or was frightened at the noise alone. In *Shinkle v. McCullough*, 116 Ky. 960, 15 Am. Neg. Rep. 63 (1903), which was an action to recover damages for personal injuries sustained by plaintiff by his horse taking fright at defendant's au-

tomobile, the court instructed the jury that if defendant was operating his machine at a high rate of speed and because thereof, or because of such speed together with the noise, the horse became frightened and defendant's conduct in operating the automobile at such speed was negligent, the plaintiff was entitled to recover. On appeal, the court held that if there was any error in the instruction, in that it authorized the jury to find for the plaintiff if they believed that the horse became frightened either at the speed or at the noise, the fright by noise not having been pleaded, the error was not prejudicial.

XIV. That from the time of said accident above described to the time of the commencement of this action the plaintiffs have incurred reasonable and necessary expenses for medical and surgical services and attendance, medicines, and hospital and nurse charges, aggregating the sum of \$700; and that it will be necessary for some time, and probably during the balance of the life of said plaintiff, Frances R. Brown, for the plaintiffs to expend large sums of money for additional medical attendance and medicines, all of which expenses have resulted solely from said accident, so caused as aforesaid.

XV. That at all of the times above mentioned said defendant was grossly careless and negligent in the following particulars, among others, to-wit:

In driving said automobile rapidly around said corner, and in approaching and in passing the plaintiff, and said horse and vehicle, at a high and excessive rate of speed, as aforesaid, without using the "muffler," so-called, as required by law, but having the same cut out or disconnected, and with said automobile emitting loud explosive or puffing sounds, as aforesaid; and in driving, operating, managing and controlling said automobile at said time and place at a speed greater than was reasonable or proper under the circumstances, with regard to the traffic and use of said highway by others, and particularly by said plaintiff, Frances R. Brown, and in such a careless and negligent manner as to endanger the life and limb of said plaintiff, as aforesaid; all contrary to the laws of said State; and that the acts of negligence upon the part of the defendant herein described were the proximate cause of and resulted in said accident and the injuries to said plaintiff, Frances R. Brown, and damage to said plain-

B. Cranking Machine.

The noise due to the cranking of a machine may cause horses to take fright. *Tudor v. Bowen*, 152 N. C. 441, 30 L. R. A. (N. S.) 804 (1910). In this case it appeared that the defendant was driving his automobile along the streets of a city and had stopped for the purpose of examination, within a few feet of the place where plaintiff's team of horses was standing in charge of a competent driver. The cranking of the machine for the purpose of starting, produced what witnesses stated to be "a terrible noise," because the gear wheels were loose. It

was shown on the trial that the noise was much greater than that produced by other machines. The court said: "The proximity of the auto to the plaintiff's team when it stopped was such that the defendant must have seen the horses and vehicle unless he was either blind or guilty of gross carelessness. There is evidence sufficient to go to the jury, that when the defendant began to "crank up," the animals manifested fright, and that defendant, if at all observant, must have seen it, but, instead of stopping his cranking, he continued until the machine started."

The facts in *Fischer v. McGrath*, 112

tiffs herein described, to their damage in the sum of Ten Thousand Dollars.

Wherefore, plaintiffs pray judgment against the defendant in the said sum of Ten Thousand Dollars (\$10,000), and for their costs and disbursements in this action, and such other and further relief as to the Court may seem just.

CHADWICK, J. On March 20, 1909, Frances R. Brown, one of the plaintiffs, and who will be hereafter referred to as "the plaintiff" in this case, had gotten into a buggy at a hitching post near Hall's store, East Fern Hill, in Pierce county. She was on what is known as Pacific Avenue. Just as she got into the buggy, she saw an automobile, which proved to belong to the defendant, coming at right angles on what is known as the Wilson road. Hall's store faces Pacific avenue. The automobile, driven by defendant's chauffeur, swung around the corner and headed toward the plaintiff. Her horse, which had never before shown unusual alarm at an automobile, became nervous. She stood up in the buggy, and she says, and the whole evidence seems to show, that she signaled the automobile to stop. She says she also called out to the driver, though her testimony is unsupported in this respect. Seeing, as she says, that the automobile was not going to stop, she got out of the buggy, took the horse by the lines, and, as the automobile went by, the horse lunged across the street, pulling her down, and so bruising and maiming her and tearing the pelvic organs peculiar to women that she was com-

Minn. 456 (1910), showed that the plaintiff was a young woman about 24 years of age and accustomed to drive horses upon the farm and highway, and that, one day as she was driving a single buggy drawn by a gentle horse along a country highway, she saw defendant about 80 yards distant on his knees looking at his automobile. The plaintiff, not having any reason to anticipate trouble in passing a stationary automobile, kept on her way. When she was about to drive past, the defendant without giving any warning, suddenly started his motor, which caused the usual nerve-racking noise made by an automobile when cranked. The noise frightened the horse and caused him to turn quickly to one side, throwing the plaintiff into the ditch. The court said:

"It may be fairly inferred from the evidence that the defendant did not look or do anything to ascertain if any teams were approaching before he started to crank his machine * * *

We agree with the learned trial judge and counsel for defendant that the defendant had a right to stop his automobile on the highway for a reasonable time to adjust it, and to start his motor on the highway, and that the mere fact of starting it was not evidence of negligence. The mere starting of the motor, however, was not the negligence charged in the complaint, which alleged that machinery of the automobile was suddenly and negligently set in motion without warning to the plaintiff. The failure to warn the plaintiff of his intention to start the

pelled to undergo an operation which resulted in their removal. Plaintiff alleges several items of negligence—the excessive speed, cutting out the muffler within the limits of an incorporated town, loud, explosive, and puffing sounds, and, having control of the automobile, failure to stop in obedience to plaintiff's signal and call; it being apparent that she did not have control of her horse. The defense was a general denial, and an affirmative defense that plaintiff had handled her horse in an extremely careless and incautious manner; it being of a nervous disposition, which was known to plaintiff. The jury returned a verdict in favor of the plaintiff in the sum of \$2,500. Defendant has appealed.

It is insisted that the verdict is inconsistent with several special verdicts returned by the jury, and that the evidence is insufficient to support the verdict. The following interrogatories, among others, were answered by the jury: "No. 1. Can you say and find, under your oath, what it was that caused Mrs. Brown's horse to become frightened? Answer: Noise, appearance, and excessive speed of an automobile on the 'Wilson road.' No. 2. Was it the appearance of the automobile; was it the noises made by the automobile; or what was it that caused Mrs. Brown's horse to become frightened? Answer: Yes. Yes. Sudden appearance as it came into sight along 'Wilson road,' and disconnecting and connecting power at short intervals at

motor is the gist of the plaintiff's alleged cause of action. We are of the opinion that it was a question for the jury to decide, in view of the time, place, and circumstances of the accident, whether in the exercise of due care the defendant ought to have known that the plaintiff was about to pass him, and either waited until she had passed him before cranking his motor or warned her of his purpose so to do. Therefore the court erred in not submitting the question to the jury."

II. Statutory Requirements.

In most of the States statutes have been passed requiring the operators of motor vehicles to reduce speed, or to stop upon signal or when horses show any indications of fright. In only a very few of the States, however, do the statutes require the operator to shut off

the motive power in addition to the stopping of the car. The Legislatures apparently thereby recognize that the stopping of the machine to avoid causing injury, does not necessarily require the stopping of the motive power. If the machine approaches a frightened horse it may be necessary for the operator to retain his power to avoid injury to himself. The duty to stop the running of the machinery, and thereby stop loud or unpleasant noises, must be governed by the general law of negligence.

The Minnesota statute (Rev. Laws 1905, § 1277) provides that "the operator of any such vehicle, propelled upon any public road, shall stop the same on signal from any person driving horses or mules on such road until such horses or mules have passed." In *Mahoney v. Maxfield*, 102 Minn. 377, 14 L. E. A. (N. S.) 257 (1907), the

the time the car turned corner and later. No. 3. Do you find from the evidence that the muffler on said machine was cut out and disconnected at the time of the accident? Answer: No evidence." It is insisted that the verdict cannot stand, because the special verdicts leave the cause of the horse's fright uncertain; that it may have been induced by any one of a half a dozen causes, leaving the true cause open to conjecture, speculation, and theory. It can make no difference in law whether the horse became frightened at the appearance of the car, or at the noises made by the car, or the sounding of the horn before the turn was made into Pacific avenue from the Wilson road. These are all mere details. The fact remains, and the jury have so found it to be, that the horse was frightened, and, so far as the evidence shows, would not have been frightened but for the presence of the automobile. We cannot presume that courts and juries are possessed of sufficient "horse sense" to determine whether the horse was indifferent to the speed, and observant of the noise, or careless of the noise, and alert to the sudden appearance of the automobile around the corner of the store building. About the same contention was made and met in *Indiana Springs Co. v. Brown*, 165 Ind. 465, 18 Am. Neg. Rep. 392, 74 N. E. 615, 1 L. R. A. (N. S.) 238: "Counsel for appellant argues that, since it is not shown by the complaint that defendant knew the cause of the fright of plaintiff's

court said that the question whether the failure to stop the motive power of the vehicle as well as the forward motion of the machine was negligence within the meaning of this statute, must be determined by the circumstances of each case. The statement of the facts in this case is incomplete.

When a horse driven along a public highway becomes frightened at the approach of an automobile, the Maryland statute, which provides that motor vehicles must stop when horses become "alarmed by said motor vehicle" and shall in the meantime make "as little noise as possible," requires the driver of the car to stop the engine if the noise from its operation tends to frighten the horse. *Fletcher v. Dixon*, 107 Md. 420 (1908). Subsequent appeal, 113 Md. 101 (1910).

Even in absence of any statute on the subject of noise, the court in *Sapp*

v. Hunter, 134 Mo. App. 685 (1909), held it to be the duty of the driver of a car, not only to stop the car, but also to stop the motor at once, when a reasonably prudent person could see that to continue the noise of the machine might increase the terror of the horses. The court said that "the evidence showed, and, indeed, it is a matter of common knowledge, that automobiles run by gasoline motors continue to make a whirring, grinding, nerve-racking noise after the car is stopped. Knowing, as he (defendant) did, that the horses had backed in fright behind the mill, we are of opinion defendant should have known that to continue the noise might, and probably would, increase the terror of the animals to the point of making them unmanageable, and as it was in his power to stop the noise immediately, the question of whether

horse, it fails to show negligence. Will any one seriously say that the driver of such an automobile, recently brought to the vicinity, may speed it at 20 miles an hour along the highway, towards approaching harnessed horses, puffing and whirring so as to be heard several hundred yards away, and seeing a horse in front of him, hitched to a buggy, rearing, plunging, and trying to bolt from the road without any other apparent cause, is justified in maintaining his speed because he does not know what it is that causes the horse's fright?" We find no inconsistency in the special verdict.

It is further contended that there is no evidence to sustain the verdict. In discussing this feature of the case, appellant has discussed all of the charges of negligence save one; that is, the failure to observe the signal and call to stop. We have no hesitation in saying that the evidence was somewhat conflicting; that some of the charges of negligence were hardly made out; and that the jury would have been warranted in returning a verdict for the defendant. But where the complaint rests, not upon one, but several charges, it is enough that a case is made out on any one of them. That is to say, the case will not fail because one or more are not sustained by the evidence, so long as the evidence shows a sustained cause of action. It is the rule of law that the right to operate an automobile carries with it the right to make the noises incident to its operation. *Eichmann v. Buchheit*, 128 Wis. 385, 107 N. W. 325; *House v. Cramer*, 134 Iowa, 374, 112 N. W. 3, 10 L. R. A. (N. S.) 655. But the rule without a proper limitation would be dangerous, indeed, if not absolutely destructive of the rights of a driver of a vehicle drawn by

his failure to stop it was negligence was one of fact to be solved by the jury."

III. Evidence as to Noise.

Evidence that an automobile was operated along a city street at a rate of speed of 10 to 12 miles an hour, and gave forth loud, puffing noises which could be heard for two blocks, that a humming sound issued from its engine and that steam or smoke of a pronounced odor came from the exhaust, is sufficient to sustain a verdict in favor of plaintiff for damages to his horse, wagon and harness caused by the horse taking fright at the negligent operation of the automobile. *Ma-*

son v. West, 61 App. Div. 40, 70 N. Y. Supp. 478 (1901).

In an action to recover for injuries sustained by the running away of a horse which had become frightened at the noise of an automobile, it was held to be competent for a witness to state that "the defendant's automobile made more noise than any he had ever heard." *Fletcher v. Dixon*, 107 Md. 420 (1908). Subsequent appeal, 113 Md. 101 (1910).

So, testimony as to the comparative amount of noise made by different kinds of automobiles, based on comparison made by a witness, where there was no proof as to the condition of the machine with which the test was

horses. If the operator of a machine knows, or in the exercise of reasonable prudence ought to know, that his machine has excited a horse so as to render it unmanageable, it is his duty to stop the machine, for the presumption is that the machine is always under the control of its operator. *Shinkle v. McCullough*, 116 Ky. 960, 15 Am. Neg. Rep. 63, 77 S. W. 196, 105 Am. St. Rep. 245; *McIntyre v. Orner*, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 359; *Indiana Springs Co. v. Brown*, 165 Ind. 465, 18 Am. Neg. Rep. 392, 74 N. E. 615, 1 L. R. A. (N. S.) 238; *Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 108 Am. St. Rep. 196; *Ward v. Meredith*, 220 Ill. 66, 77 N. E. 118; *McCummins v. State*, 132 Wis. 236, 112 N. W. 25; *Berry*, Law of Automobiles, §126; *Huddy on Automobiles*, c. 11. It is a further rule that a driver of a machine must take notice of the road. *Grant v. Armstrong*, 55 Wash. 365, 104 Pac. 632; *Lampe v. Jacobson*, 46 Wash. 533, 90 Pac. 654; *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915. And further that, if a driver is requested-by signal or otherwise to stop, he shall not go further, unless such movement is necessary to avoid accident or injury, or unless the animal is under the control of its rider or driver. These rules have been recognized and written into the statutes of this State. Rem. & Bal. Code, § 5570. The court submitted the question of defendant's negligence upon the charge of failing to observe and act upon the signal and call, as well as the right of the defendant to use his judgment as to stopping immediately or passing beyond the horse before halting. This being enough to sustain the verdict, it is unnecessary to discuss the other charges of negligence.

made, was held to have been properly excluded, in an action brought to recover for personal injuries sustained by reason of plaintiff's horse taking fright at the negligent operation of an automobile. *Porter v. Buckley*, 147 Fed. 140 (1906).

IV. Protection of Occupants of Automobile.

There may, however, be instances when it may be dangerous to the occupants of an automobile to stop the engine. Speaking on this subject, the court in *Sapp v. Hunter*, 134 Mo. App. 685 (1909), said: "If the machine is approaching a frightened animal on a

steep grade it might be highly dangerous to the occupants of the car to stop the motor. Where a person is compelled to choose between protecting himself and those in his charge against possible injury, or protecting others who are in peril, he is justified in obeying the instinct of self-preservation." In this case the evidence showed that the lives of the occupants of the car would not have been endangered in the least by the stopping of the motor, and therefore it was the absolute duty of the driver not only to stop the forward motion of the car but to discontinue the noise.

The jury found for plaintiff upon the issues of fact, and, finding no error in law, the judgment is affirmed.

RUDKIN, C. J., and CROW, DUNBAR, and MORRIS, JJ., concur.

SHEBOR v. BARBOUR.

[SUPREME COURT OF ALABAMA, JANUARY 16, 1912.]

— Ala. —, 58 So. 276.

1. Automobiles—Pleading—Negligence—Wanton Acts.

A count in a complaint in an action for wanton injuries alleged to have been received from a collision between plaintiff and defendant's automobile, as the proximate consequence of "the wanton act of defendant's agent or servant while acting within the line and scope of his authority" is sufficient, although it does not set out the facts constituting wanton conduct.

2. Automobiles—Negligence—Highways.

A pedestrian is not required to "look and listen" for rapidly moving automobiles before crossing a street; but both driver and pedestrian, each recognizing the rights of the other, are required to exercise reasonable care.

3. Automobiles—Pleading—Contributory Negligence—Sufficiency of Plea.

A plea that defendant stepped "immediately in front" of the automobile by which he was injured, is a good answer to a count charging simple negligence.

4. Pleading—Demurrer—Plea Addressed to Several Counts.

The action of the court in sustaining a demurrer generally to a plea which, because addressed to each count of the complaint, is equivalent to a separate plea to each, is erroneous unless all the pleas are subject to the demurrer.

5. Automobiles—Trial—Requested Instruction—Singling Out Facts.

A requested charge in an action for injuries sustained by one who was run over by an automobile, is properly refused as misleading, where it singles out the evidence pertaining to the speed of the car and requires a charge on that fact alone, without regard to whether it caused the injury.

6. Automobiles—Negligence—Speed—Question for Jury.

The question whether the speed of an automobile was, under the evidence, wanton, is one for the jury.

7. Damages—Punitive—Wanton Negligence.

Punitive damages may be awarded for personal injuries wantonly inflicted by the running of an automobile.

8. Automobiles—Contributory Negligence—Sufficiency of Defense.

Contributory negligence is not a defense where the injuries complained of were inflicted by the running of an automobile.

NOTE.

On the subject of Averments of Negligence in Complaint, see note in 5 Am. Neg. Rep. 51.

And on the "Stop, Look and Listen," doctrine, see note in 9 Am. Neg. Rep. 408.

Appeal by defendant, W. C. Barbour, from a judgment of the City Court of Birmingham, rendered in favor of plaintiff, Ben Shebor, in an action brought to recover damages for injuries caused by an automobile. Reversed.

For appellant—Tillman, Bradley & Morrow, and Charles E. Rice.

For appellee—Bondurant & Smith.

STATEMENT OF FACTS: Count B is as follows: "Plaintiff claims of the defendant the sum of \$15,000 as damages, for that, whereas, heretofore, and on, to wit, the 4th day of March, 1910, the defendant was running and operating an automobile upon the streets of Birmingham, Jefferson County, Alabama, when the same ran against plaintiff, a pedestrian, who was crossing said street, and plaintiff was thereby greatly injured, bruised and mangled. (Here follows catalogue of injuries, which are alleged to be permanent, and the damages resulting therefrom.) And plaintiff avers that his said injuries and damages were proximately caused by reason of, and as a direct consequence of, the wanton acts of the defendant's servant or agent while acting within the line and scope of his authority as such." The third plea sets up contributory negligence, in that plaintiff negligently attempted to cross said street without looking for said automobile, which was then and there approaching in rapid motion on said street, and was struck by said automobile and injured, although he knew automobiles were likely to pass on said street at any moment. Count A was similar in all respects to count B, except that it alleged simple negligence. According to the record, count 3 of the complaint was withdrawn. Plea 5 was a plea of contributory negligence, alleging that plaintiff well knew that automobiles passed along said street at frequent intervals at a rapid rate of speed. Nevertheless, with such knowledge, plaintiff voluntarily attempted to cross said street in front of and in dangerous proximity to an automobile, then and there approaching in dangerous proximity to him, without looking for the said car, and was struck by said car. Plea 6 was of contributory negligence, alleging that plaintiff had looked and had seen the said automobile approaching him on said street in rapid motion, and knowing that, if said automobile struck him, great bodily injury would result to him, nevertheless plaintiff, with such knowledge, and while seeing said automobile, voluntarily stepped immediately in front of said rapidly moving automobile, and was struck and injured.

The following charges were refused to the defendant: (1) "The mere fact, if it be a fact, that the defendant's automobile was being operated along Eleventh avenue at a negligent rate of speed, does not entitle the plaintiff to recover against the defendant in this case." (4) Affirmative charge as to count B. (6) "If you believe the evidence, you cannot award the plaintiff any damages for the purpose of punishing the defendant." (7) "If you believe, from the evidence, that plaintiff on the occasion complained of acted in a manner in which an ordinarily prudent person would not have acted under the same circumstances, and his said conduct was the proximate cause of his injuries, then you must find for the defendant." (10) "If you believe the evidence in this case, the plaintiff was guilty of negligence." (11) "The court charges you that it was the plaintiff's duty, before crossing Eleventh street at the intersection of Fourteenth street, to look for vehicles or automobiles on said Eleventh avenue; and the court further charges you that, if you believe that from the evidence that the plaintiff did see defendant's automobile approaching him on Eleventh avenue, it was his duty to use reasonable care to prevent a collision with said automobile." (12) "If you believe, from the evidence, that the defendant's automobile at the time of the accident was being operated at a still greater rate of speed than that fixed by law, still the court charges you that you cannot find for the plaintiff, if you further believe from the evidence, that plaintiff saw the defendant's automobile approaching him in rapid motion, and thereafter negligently went in front of same, and that his so doing was the proximate cause of the alleged injury." (13) "If you believe from the evidence that the plaintiff was guilty of the slightest negligence which proximately contributed to his alleged injuries in attempting to cross Eleventh avenue in front of defendant's automobile after seeing the same, if you believe from the evidence that he did see it coming, and while it was approaching in dangerous proximity to him, then your verdict must be for the defendant." (14) "If you believe from the evidence that the plaintiff was negligent in crossing or attempting to cross Eleventh avenue in front of and in dangerous proximity to the defendant's said automobile, and that said negligence proximately contributed even in the slightest degree to the injury received by him by being struck by defendant's automobile on Eleventh avenue, then the court charges you that plaintiff cannot recover any damages on account of the mere failure of the person in charge of the defendant's automobile to keep a proper lookout for plaintiff, if you believe a proper lookout was not kept, nor on account

of a mere failure of the person in charge of said automobile to sound the gong of his said car, if you believe no gong was sounded."

SIMPSON, J. This is an action by the appellee against the appellant for damages on account of personal injuries claimed to have been received by the plaintiff by being struck by an automobile of the defendant's on the streets of Birmingham.

The court did not err in overruling the demurrer to count B of the complaint. The count does not attempt to set out the facts constituting wanton conduct, but, in accordance with the decisions of this court, merely alleges that the injuries were received as the proximate consequence of "the wanton act of defendant's servant or agent while acting within the line and scope of his authority as such." So. Ry. Co. v. Weatherow, 153 Ala. 171, 44 So. 1019; Martin's Case [Memphis & C. R. Co. v. Martin], 117 Ala. 367, 23 So. 231; Burgess' Case [Ala. G. S. R. Co. v. Burgess], 114 Ala. 587, 2 Am. Neg. Rep. 483, 3 Am. Neg. Rep. 320, 22 So. 169. The case of Ala. G. S. R. Co. v. Guest, 144 Ala. 373, 381, 382, 14 Am. Neg. Rep. 497, 39 So. 654, does not discuss the necessary allegations in the complaint as to wantonness, but deals with the evidence necessary to support such a count, which, according to the statement of the court, seems to have been in general terms, just as the present one is. The same is true with regard to the case of Birmingham Ry., L. & P. Co. v. Williams, 158 Ala. 381, 48 So. 93.

The third plea is an attempt to apply to injuries by automobiles on streets the "look and listen" law as applicable to railroads. There is no warrant in law for such application. A railroad acquires a right of way for the express purpose of running trains at a rapid rate of speed over the same, and travelers on the public highways, knowing this fact, are required to observe due caution in approaching the tracks. Even as to street railroads, the tracks mark the line of danger, so that the pedestrian knows just where to look and how to avoid the point of peril; but automobiles have no special privileges in the streets, more than other vehicles. They simply travel upon the streets with the same privileges and obligations as other vehicles, and the mere fact that they *can* run faster than other vehicles, does not give them any *right* to run at a dangerous rate of speed, any more than the fact that one man drives a race horse gives him a right to travel the streets at a higher rate of speed than another who drives a plug. The simple rule is that drivers on the streets and pedestrians, each recognizing the rights of the others, are required to exercise reasonable care. Hennessey v. Taylor, 189 Mass. 583, 17 Am. Neg

Rep. 285, 76 N. E. 224, 3 L. R. A. (N. S.) 345, 4 Ann. Cas. 396, and notes; *Buscher v. N. Y. Transp. Co.*, 106 App. Div. 493, 18 Am. Neg. Rep. 575, 94 N. Y. Supp. 798; *Caesar v. Fifth Avenue Coach Co.*, 45 Misc. Rep. 331, 90 N. Y. Supp. 359; *Kathmeyer v. Mehl*, (N. J.) 17 Am. Neg. Rep. 688, 60 Atl. 40; *Berry*, Law of Automob. § 124, p. 113; *Id.*, § 171, p. 166. This court, in speaking of the relative duties and liabilities of street railroads and pedestrians, says: "The duty of the company to recognize the rights of persons in the lawful use of the streets is imperative. As the company is held to a high degree of care, to a degree commensurate with the circumstances of each particular case, so likewise the citizen is held. • • • Each party, in order to avoid accident, is bound to exercise ordinary care, and such reasonable prudence and precaution as the attending circumstances may require." *Birmingham Ry., L. & P. Co. v. Williams*, 158 Ala. 387, 48 So. 96.

There was no error in sustaining the demurrer to plea 3, as an answer to count A of the complaint. For reasons already assigned, there was no error in sustaining the demurrer to plea 3 as an answer to count 3 of the complaint.

For reasons already stated, and because plea 5 has no application to the wanton counts of the complaint, there was no error in sustaining the demurrer to said plea.

While plea 6 might have been more definite, by stating how far the plaintiff was from the automobile when he stepped in front of it, yet, understanding the meaning of the words "immediately in front of it" to indicate close proximity, the plea was a good answer to count A, which was for simple negligence, and the court erred in sustaining the demurrer to said plea. For the same reason, the demurrer to plea 4 should have been overruled.

Plea 6, like others, was addressed "to each and every count of the complaint," which was the equivalent of filing a separate plea to each count of the complaint. The action of the court in sustaining the demurrer generally to said plea operated as if it had sustained the several demurrers to each count of the complaint in one order, without separating them, in which case the court would be in error, unless all of the pleas were subject to the demurrer.

There was no error in the refusal to give the first charge requested by the defendant, as it was singling out a part of the evidence and requiring a charge on that fact alone, without regard to whether the negligent act caused the injury. It was calculated to mislead the jury.

There was no error in the refusal to give the fourth charge requested by the defendant. It was a question for the jury whether the driving of the auto car, at the rate at which it was moving over the streets of the city, was, under the evidence, wanton.

From what has been said as to count B, there was no error in refusing to give charge 6, requested by the defendant.

The seventh charge requested by the defendant ignored the wanton count, and was properly refused.

The tenth charge was properly refused, and it was calculated to mislead the jury on the question of contributory negligence as affecting the wanton count; also, the question of the plaintiff's negligence was, under the evidence, a matter for the jury.

For the same reason, the ignoring of the wanton count, charges 11, 12, 13 and 14 were properly refused.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded. All the Justices concur, save DOWDELL, C. J., and McCLELLAN, J., not sitting, and ANDERSON and SAYRE, JJ., who concur, except that they think that plea 3 was good as to count A, and that the court erred in sustaining the demurrer to the same.

HARTLEY v. MILLER.

[SUPREME COURT OF MICHIGAN, MARCH 13, 1911.]

165 Mich. 115.

Automobile—Negligent Operation by Borrower—Owner's Liability.

The owner of an automobile which is being operated by a borrower, though the former is in the car at the time, is not liable, in absence of statute, for personal injuries to a conductor who was standing on the board of a street car, caused by the negligent operation of the machine by the borrower, on the theory that an automobile, being a dangerous machine, the owner must be responsible for the manner in which it is used.

Appeal by plaintiff, William Hartley, from a judgment of the Circuit Court of Wayne County rendered in favor of defendant Frank P. Miller, in an action to recover damages for personal injuries resulting from the negligent operation of an automobile. **Affirmed.**

For appellant—McHugh & Gallagher.

For appellees—Albert McClatchey.

STONE, J. It appears that the plaintiff was a street car conductor in the employ of the D. U. R. in the city of Detroit. On Sunday,

CASE NOTE.

Liability of Owner of Automobile for Negligence of Borrower.

I. IN GENERAL, 126.

II. MEMBER OF FAMILY, 127.

I. In General.

An owner of an automobile cannot be made liable for personal injuries inflicted by the negligent operation of the car when the same was in the possession of another, merely because he owns the machine. *Parsons v. Wisner*, 113 N. Y. Supp. 922 (1909).

So, an owner of an automobile who merely permits another to borrow it, or to use it, does not thereby become the principal and the latter the agent, so as to charge the former with the

latter's negligent operation of the car. *HARTLEY v. MILLER*, 165 Mich. 115 (the case annotated); *Lewis v. Amorous*, 3 Ga. App. 50 (1907).

In the *Lewis* case, *supra*, it was held that where an automobile is taken, without the permission of the owner, from the place where it was kept, by one old enough to be discreet and responsible in the eyes of the law, the owner will not be liable for a death caused by the negligent operation of the car, although the person who thus took the car was inexperienced in the operation of the car, and although the act of the owner in leaving the automobile at the shop or garage furnished the opportunity whereby such person obtained possession of it.

The case of *Simeone v. Lindsay*, 6

May 24, 1908, about 3:45 P. M., he was engaged in his duties as conductor on a Fourteenth avenue car, running east on Henry street from Grand River avenue to Cass avenue. The car was an open one with a running board on the right hand side. The plaintiff was standing on this running board, collecting fares. The defendant, Frank P. Miller, at this time was the owner of the automobile. On the night preceding the day in question the defendant August Lootens visited said Miller at his home and asked for the loan of his automobile on the succeeding day. Miller consented to let Lootens have the automobile on the following day. Accordingly, between 2 and 3 o'clock P. M. Lootens called at Miller's home for the automobile and on his (Lootens') invitation, Miller entered the auto and rode to his (Lootens') home, Lootens operating the machine; and when they arrived there, Lootens and his company insisted upon Miller's accompanying them on the ride, and Miller finally acceded to their invitation and went with them. There were two front seats in the automobile. Lootens sat on the right-hand side, in the driver's seat, and operated the

Pennewill (Del.) 224 (1907), was an action brought to recover damages for personal injuries sustained by plaintiff by reason of being run down by an automobile operated by defendant at an excessive rate of speed, without giving any warning of its approach. The defendant denied his liability on the ground that he was not operating, had no control of or anything to do with the automobile at the time of the accident. The court charged the jury as follows: "In order for the plaintiff to recover you must be satisfied from the evidence not only that his injuries were caused by the negligent operation or running of the automobile, but that it was so negligently operated by the defendant. If the automobile at the time of the accident was entirely operated and controlled by some one else other than the defendant, the plaintiff could not recover. It is not, however, necessary that the defendant should have been the owner of the automobile, because if you believe that he had at the time of the accident, control of the machine so as to be able to govern its management or oper-

ation, any negligence in operating the machine would be the negligence of the defendant." The jury reported a verdict for the plaintiff.

II. Member of Family.

The mere fact that the person who had possession of the automobile at the time of the accident, was a member of the family of the owner, does not render the latter liable for injuries caused by the negligent operation of the car, on the theory of master and servant. In *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228 (1908), it appeared that the car, which caused plaintiff's horses to take fright and run away, was being driven by the owner's son, a man 20 years old, who had taken the machine out to deliver Christmas presents on his own account. A similar decision was rendered in *Reynolds v. Buck*, 127 Iowa, 601, 18 Am. Neg. Rep. 412 (1905).

But the owner of an automobile has been held liable for negligent injuries, where he contemplated that his daughter should use the machine. *Winfrey v. Lazarus*, 148 Mo. App. 388 (1910).

machine. Miller occupied the other front seat. It is admitted that Miller had loaned the machine to Lootens; that he (Miller) accompanied the party on Lootens' invitation, and as Lootens' guest, and that Miller did not in any way participate in the operation or control of the automobile. Lootens had had considerable experience in the operation of automobiles, though he had never driven this particular machine before the day of the accident. After leaving Lootens' home, the party started on the drive, and finally reached Second avenue, and proceeded north along that thoroughfare toward Henry street, and came into collision with the street car on which plaintiff was employed, injuring him, at the corner of Second avenue and Henry street. There was some dispute as to the manner of, and responsibility for, the accident, but it is not material to the question presented here. When all of the testimony had been submitted, defendant Miller moved the court to direct a verdict of no cause of action as to him, upon the ground that the evidence showed that at the time of the accident the automobile had been loaned by defendant

In this case it appeared that the defendant, who was the owner of the automobile, was on a trip to Europe but had, before his departure, placed a man in charge of the machine as chauffeur. Defendant's married daughter had been accustomed to use the machine, and during the absence of her father spent a large part of her time at his house. On the day of the accident she was down town taking lunch and telephoned to her father's house to have the car sent down to meet her. The message was conveyed from the house to the chauffeur who at once proceeded to drive the car to meet the daughter, and while on the way ran into plaintiff's buggy, in which plaintiff was riding, breaking the buggy and throwing plaintiff into the street. In stating the principles on which the case was decided, the court said: "It seems very clear to us from the evidence in this case, that the chauffeur, Conley, was acting in the course of his employment by the defendant when he obeyed the direction of the defendant's daughter to

bring the machine down for her use. The defendant, by his own testimony, shows beyond any room for doubt that when he went on his journey he left his machine for the convenience and at the service of the members of his household. He said, in effect, he did not want to discharge Conley because good chauffeurs were not easily picked up. But he did more than merely retain Conley in his employ,—he left him in charge of the machine, obviously intending it to be used."

And the fact that a chauffeur did not take out a car at the time of the accident upon any errand of his own, but in obedience to the order of a member of his employer's family, for the purpose of entertaining friends of the defendant and the guests of his sister, and in so doing disobeyed his employer's orders not to take the car out unless the employer accompanied it, does not prove that the chauffeur was not acting within the scope of his employment and upon the business for which he was employed by the master, so as to relieve the latter from

Miller to defendant Lootens, and that the latter was at such time in actual, active control and operation of the automobile in his own behalf, and was not in any way operating the same as the agent or the employee of the defendant Miller; that defendant Miller was, at the time of the accident, a mere guest in the automobile, and not in any way responsible for its operation or control. This motion was granted, and a verdict and judgment were entered for defendant Miller, and the case proceeded to a verdict and judgment against defendant Lootens in favor of the plaintiff. The plaintiff has appealed, and assigns error in granting defendant Miller's motion, and in directing a verdict of no cause of action as to defendant Miller.

It will be noticed that there is nothing in the record to show that Miller had ever operated the auto, or that he could operate it, or that he had any greater knowledge or skill than Lootens possessed as to its operation.

It should be borne in mind that the alleged cause of action arose before the statute of 1909, regulating motor vehicles, was enacted.

It is the contention of the plaintiff that, because defendant Miller was present and the machine was being used with his consent at the time of the injury complained of, he is liable; that an automobile being a dangerous machine its owner should be held responsible for the manner in which it is used. It is the claim of defendant Miller

liability for personal injuries caused by running into a buggy in which plaintiff was riding. The test in such cases is whether the act was done in the performance of the business for which the servant was employed. *Moon v. Matthews*, 227 Pa. 488, 29 L. R. A. (N. S.) 856, 136 Am. St. Rep. 902 (1910).

Where the father was the owner of an automobile which he kept upon his premises and his daughter, who was about 19 years of age, was accustomed to drive it, doing so whenever she felt like it, asking permission to use it when her father was at home, but taking it without permission when he was absent, it was held in *Doran v. Thomson*, 76 N. J. L. 754, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677 (1908), an action against the father to recover damages for personal injuries caused by her negligent oper-

ation of the machine when using the same for her own pleasure in taking out her friends, that the proof was not sufficient to constitute the daughter the servant or agent of her father, and therefore the father was not liable. The trial court charged the jury that "if she took the machine out at the time in pursuance of a general authority of her father to take it out whenever she pleased for the pleasure of the family, and for her own pleasure, for the purpose for which the master bought it, for the purpose for which her father owned it, for the purpose for which he expected her to operate it, then she was the servant of the father. Under those circumstances, that was the business for which the father bought the machine." This charge was held on appeal to be erroneous because it based the creation of the relation of master and servant upon the pur-

that it is undisputed that the automobile had passed into the possession and control of defendant Lootens for the day, and that Miller did not have the right or authority to dictate or direct the manner in which the automobile should be operated; that it was as much in the control of Lootens for that day as it would have been had he been the absolute owner thereof; that an automobile is not a dangerous instrumentality, and under such circumstances there is no theory upon which Miller could be held liable for the negligence of Lootens. In our opinion this claim of defendant Miller is supported by the great weight of authority.

Doran v. Thomsen, 74 N. J. Law, 445, 66 Atl. 897, is a leading case upon this subject. It was there held that the owner of a motor vehicle is not liable for an injury caused by the negligent driving of a borrower, if it was not used at the time in the owner's business. A number of cases are there cited, including *Herlihy v. Smith*, 116 Mass. 265, 15 Am. Neg. Cas. 709n. See, also, *Cunningham v. Castle*, 127 App. Div 580, 111 N. Y. Supp. 1057, decided in 1908, where the same rule is applied, and where the authorities are reviewed at length.

The general proposition as to the responsibility for a tort is stated by *Andrews, J.*, in *King v. N. Y., C. & H. R. R. Co.*, 66 N. Y. 181,

pose which the parent had in mind in acquiring the ownership of the vehicle and its permissive use by the child, and because it ignores an essential element in the creation of that status, as to third persons, that such use must be in furtherance of and not apart from the master's service and control.

One who purchased an automobile for the comfort and pleasure of his family, was held liable in *Stowe v. Morris*, 147 Ky. 386 (1912), for the negligence of his son, who was 18 years of age and authorized by his father to use the machine at any time for such purpose, in running down a child who was riding a bicycle in the street, when the son had use of the machine for the purpose of taking out his sister and some of her friends for pleasure. The court regarded the son as the servant or agent of his father, not in the performance of an independent service of his own, but in the per-

formance of the business of the defendant. The court cited with approval the case of *Moon v. Matthews*, 227 Pa. 488, 29 L. R. A. (N. S.) 856, 136 Am. St. Rep. 902 (1910).

The owner of an automobile which he had purchased for the benefit and pleasure of his family, was held liable in *Daily v. Maxwell*, 152 Mo. App. 415 (1911), for the negligence of his 16-year old son on whom he relied to perform the duties of chauffeur for the family, in running the car without warning when using the same with his father's consent to take some of his friends for a ride, at a high rate of speed around a corner, thereby causing plaintiff's horse, which was gentle but high spirited, to take fright and run away, upsetting the buggy and injuring her. In the course of its opinion the court said: "Where a chauffeur, either with or without his master's consent, uses the machine

16 Am. Neg. Cas. 819, 23 Am. Rep. 37, as follows: "Where one person has sustained an injury from the negligence of another, he must, in general, proceed against him by whose negligence the injury was occasioned. If, however, the negligence which caused the injury was that of a servant while engaged in his master's business, the person sustaining the injury may disregard the immediate author of the mischief and hold the master responsible for the damages sustained."

In *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285, it was held that the doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the time, and in respect to the very transaction

for his own business or for his own pleasure and negligently inflicts injury on another, the master cannot be held liable, for the reason that the negligent act being entirely outside the scope of the servant's employment, cannot call into action the rule of *respondeat superior*. The fact of consent is material only in the solution of the issue of whether or not the use of the machine was, in fact, on business of the master. Should we regard the relationship between the two defendants merely as that of owner and chauffeur—master and servant—the owner should not be held liable for the negligence of the chauffeur, since the evidence shows beyond question that the latter was using the machine merely for his own pleasure. But Ernest was more than a mere chauffeur. He was the minor son of the owner and was using the car for his own pleasure, it is true, but with the permission of his father and for one of the very uses for which his father kept the vehicle. The evidence discloses that the machine was devoted to the use of the family of which Ernest was a member. It was a pleasure vehicle and when used for the pleasure of one of the minor children of the owner, how can it be said that it was not being used on business of the owner? It

is the practice of parents to provide their children healthful and innocent amusements and recreations, and certainly it is as much the business of parentage to supervise and control the pleasures of their children as it is to give them nurture and education. Had Ernest been taking his mother for a pleasure ride instead of taking some of his young friends, no one would contend that he was not on his father's business; or, had he been using the car on an errand of his own, such as shopping for himself, or going to school, he would have been on his father's business, since it was the duty of his father to support and educate him. The rule that a father is not liable for the torts of his minor child applies only to cases where the tort is committed without the consent of the parent and without the scope of any duty he owes his child. We conclude that in running the car with the consent of his father and within the scope of family uses, Ernest was the agent and servant of his father."

In *Freibaum v. Brady*, 143 App. Div. 220, 128 N. Y. Supp. 121 (1911), it appeared that two brothers each owned an automobile, substantially alike except as to color, both cars being kept in a garage, and by mutual agreement each had permission to use the other's

out of which the injury arose. The following cases are also in point: *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915; *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133; *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Am. & Eng. Ann. Cas. 731, and note; *Reynolds v. Buck*, 127 Iowa, 601, 18 Am. Neg. Rep. 412, 103 N. W. 946.

The case is governed by the general rules of law governing the relation of master and servant, or principal and agent. The rule of law applicable to the care and protection of dangerous instrumentalities does not apply. *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057; *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915.

Our examination has shown that the courts of last resort in all parts of the United States have, without exception, held that, in the absence of statutory liability, the owners of automobiles were not liable for the negligence of a borrower, where the machine was not used in the master's business. Counsel for plaintiff has cited the case of *Ingraham v. Stockamore*, in the Supreme Court of New York, reported in 63 Misc. Rep. 114, 118 N. Y. Supp. 399, in support of his position. This is not a court of last resort, and it stands alone in

car. On the day of the accident defendant's brother called for a chauffeur from the company which conducted the garage and used defendant's car. In an action for damages for personal injuries caused by the negligent operation of the car by such chauffeur, the court held that defendant was not liable. The court said: "There is nothing in the record to sustain the finding of the jury that the chauffeur, at the time the accident occurred, was acting as an employee of the defendant. The defendant did not employ, pay, direct, or control him in any way; in fact, he did not know that his car was being used at the time. His one connection with the accident was the fact that he owned the car and permitted his brother to use it. * * * But, even if it be assumed that the chauffeur was employed and paid by the defendant, I do not think that would make him liable. The arrangement

simply amounted to the loaning of the car, with the driver, to the brother for his own use and purposes. The defendant would not be chargeable with the negligence of the driver while thus running the car, for the reasons stated by Lord Cockburn in *Rourke v. White Moss Colliery Co.*, L. R. 2 Com. Pl. Div. 205, as follows: 'When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him.' "

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This note does not include cases on the subject of personal injuries caused by the negligent operation of an automobile, which had been borrowed by the servant or agent of the owner for his own use or purposes.

holding that, an automobile being a dangerous machine, its owner should be held responsible for the manner in which it is used, and that his liability should extend to its use by any one with his consent. We do not understand this to be the law in any State, in the absence of statutory enactment.

We are of opinion that the circuit judge did not err in directing a verdict for the defendant Miller for the reasons stated by him, and the judgment below is affirmed.

HINDS v. STEERE.

[SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE 22, 1911.]

209 Mass. 442.

Carriers—Automobile—Degree of Care.

One engaged in the business of carrying passengers for hire over a regular route in a "sight seeing" automobile, is bound to exercise the highest degree of care consistent with the proper transaction of the business.

Exceptions by defendant to rulings of the Superior Court of Suffolk County, made during the trial of an action by Crosby A. Hinds against Emma I. Steere, in which judgment was recovered by plaintiff for damages for personal injuries suffered in a collision on the highway between a sight-seeing automobile and an electric street car. Exceptions overruled.

For plaintiff—Powers & Hall.

For defendant—David T. Montague, Wade Keyes, and Malcolm E. Sturtevant.

DECLARATION.

And the plaintiff says that at all times hereinafter mentioned the defendant was engaged in the business of operating, by her agents and servants, a sight-seeing automobile, on which passengers were received for hire and were carried through various parts of the City of Boston, in this Commonwealth, and adjoining cities and towns; that on or about the 26th day of September, 1907, the plaintiff became a passenger on said sight-seeing automobile so operated by the de-

CASE NOTE.

Injury to Passenger Caused by Negligent Operation of Automobile.

The negligence of the chauffeur of a "sight seeing" automobile cannot be imputed to a passenger so as to bar the latter's right to recover damages from a street car company whose car negligently collided with the automobile. "Being a mere passenger in the automobile," said the court, "and in a position where he could exercise no

control over the chauffeur, plaintiff was not bound by the negligence of the chauffeur, since, under no rule of law, might such negligence be imputed to him. Consequently the negligence of the motorman that co-operated with that of the chauffeur in creating the perilous situation of plaintiff affords plaintiff a cause of action against defendant railway company. * * * Of the negligence of the chauffeur, there can be no question. He owed his passengers the highest degree of care, and

fendant, and paid the fee therefor; that while the said automobile with the plaintiff as passenger as aforesaid was passing along Huntington Avenue in said Boston, and while the plaintiff was in the exercise of due care, the defendant by her agents and servants so carelessly and negligently managed and operated said automobile that, as a result of such negligence and carelessness, the said automobile collided with a certain electric street car then running on a track on said Huntington Avenue, and the said automobile by the said collision was broken and demolished and thrown against a post, whereby the plaintiff was greatly hurt and injured and his ankle was crushed and broken, and he suffered divers personal injuries and much pain and suffering, all to his great damage.

ANSWER.

And now comes the defendant in the above entitled cause, and for answer denies each and every material item, allegation and particular in the plaintiff's declaration contained.

HAMMOND, J. This was an action of tort for personal injuries suffered by the plaintiff in a collision on the highway between a "sight-seeing automobile" owned by the defendant, in which the plaintiff was riding as a passenger, and an electric car operated by the Boston Elevated Railway Company. The plaintiff brought a suit also against the railway company. The two suits were tried together before a jury and in each a verdict was rendered for the plaintiff.

Upon the question of the care required of the defendant the judge charged as follows: "With reference to the chauffeur of the automobile, the care is a little different than it is with reference to the motorman of the car. I have said to you before that a common carrier has to exercise a high degree of care with reference to pas-

senger's evidence tends to show he failed to measure to the standard of ordinary care. If he looked in the direction of the street car, he must have observed the negligence of the motorman, and a reasonably prudent person in his situation would have realized the danger of placing his passengers within striking range of a car that, for all practical purposes, was running wild." *McFadden v. Metropolitan St. R. Co.*, 161 Mo. App. 652 (1912).

In an English case it was held that

the mere fact that the owner of a motor omnibus operated the same on a highway for the carriage of passengers, when the road was in a greasy or slippery condition, well knowing that the car was likely to "skid" when the roads were slippery, does not constitute any evidence of negligence, in an action brought by a passenger to recover damages for personal injuries caused by the car "skidding" into an electric light pole. *Wing v. London General Omnibus Co.*, 2 K. B. (1909)

sengers, and in this case the chauffeur was exercising the care—should have exercised a care with reference to passengers, because these two plaintiffs were passengers on his vehicle, and for the purposes of this case, he should have exercised the high degree of care with reference to their safety, and where the care was with reference to the collision, where the danger and the damage might be very great, it is a degree of care in view of the danger, and of the injury that might be caused by any want of care. Now, if he did not exercise that high degree of care, then, so far as Mr. Hinds' case is concerned, you will find for the plaintiff against the owner of the automobile, Mrs. Steere. If he did exercise the high degree of care, then you will find for the defendant in the case against her."

To this part of the charge the defendant excepted, and the case is before us on this exception. The contention of the defendant is expressed in her brief as follows: "In that portion of the charge to the jury excepted to by the defendant, the presiding judge instructed the jury that the driver of the automobile was obliged to exercise the high degree of care required of a common carrier with reference to passengers and that if the jury found that the driver of the automobile did not exercise that high degree of care required of a common carrier of passengers, they should find for the plaintiff; or in other words, that the owner of the automobile was a common carrier of passengers. The defendant contends that she was not a common carrier of passengers within the legal meaning of that term, but was a private carrier only."

It appeared that the automobile was a five-ton truck about twenty-five feet in length and ten feet in width; that there were seats running crosswise, holding about four to five people each, the whole automobile being designed to carry about twenty-five persons; that the motive power was electricity; that through the spring and summer

652, 101 L. T. N. S. 411, 25 Times Law R. 729.

The English Motor Car Act of 1903, which makes it an offense to drive a motor car recklessly or negligently, or at a speed or in a manner which is dangerous to the public, was held in *Troughton v. Manning*, 92 L. T. N. S. 855, 21 Times Law Rep. 408, 20 Cox's C. C. 861 (1905), not to be for the protection of passengers aboard the car itself, but for the benefit of other persons using the highway.

The owner of a passenger-carrying

automobile who furnishes a driver, is liable for injury to a passenger caused by a collision between the automobile and a street car, which would not have happened but for the chauffeur's negligence in running the car at a high rate of speed without having the machine under control, although the immediate cause of the accident was the breaking of a brake-rod through a latent defect, for which the owner was in no way responsible. *Johnson v. Coey*, 237 Ill. 88 (1908).

The guest of one hiring an automo-

and early fall of 1907, preceding the accident, which took place on September 26, 1907, the automobile had a regular stand or starting place on Dartmouth street opposite the public library in the city of Boston; that from this stand or starting place the automobile usually made three trips daily on pleasant days taking persons at a stated price for each trip, the general routes of these trips being announced to the prospective patrons; that tickets were sold by the chauffeur in the employ of the defendant Steere, and also, at different hotels in the city of Boston, one of which was the Hotel Bellevue, the tickets, at that hotel being sold at the newspaper stand; that in pleasant weather the automobile, from the stand on Dartmouth street usually made a trip at a given hour in the morning over a certain general route, covering places of interest in Boston; a second trip at two in the afternoon over another general route, covering various points of interest in Cambridge; and a third trip at four in the afternoon over another general route, through the Back Bay and the Fens in Boston; and that other and different trips sometimes were made; that the plaintiff on the day of the accident had purchased tickets for himself and his wife for the trip to Cambridge, and on the return of the automobile from that trip decided to remain on it for the trip to the Back Bay and the Fens; that he therefore paid his fare for his wife and himself for this trip and was riding on the automobile, as a passenger, at the time of the accident, which occurred about 5:30 p. m. on the return of the automobile from this trip. It further appeared that these trips were sight seeing trips, and it did not appear that the automobile made any stops on any of its trips.

It thus appears that the business in which the defendant was engaged was that of carrying passengers for hire; that she had been engaged in it constantly for several months; that she had a regular stand from which the automobile started and regular routes over

bile, who sustained injuries by coming into contact with a wire fence due to the negligent operation of the car by the chauffeur furnished with the machine, was held in *Routledge v. Rambler Automobile Co.*, (Tex. Civ. App.), 95 S. W. 749 (1906), to be entitled to recover damages from the owner of the car, notwithstanding the fact that, at the time of the injury, the car was being operated at an excessive rate of speed at the request of the one who hired the car; it does not appear in the case that the plaintiff acquiesced

in such request or consented to the running of the car at such rate of speed.

The seller of an automobile who furnished a chauffeur to teach the purchaser how to operate the car, is liable to such purchaser for an accident due to the careless and reckless running of the machine by the chauffeur while testing its operation as a representative of the defendant. *Burnham v. Central Automobile Exchange*, (R. I.), 67 Atl. 429 (1907).

A cause of action is stated in a

which it ran; that by placing the tickets for sale at different hotels she publicly advertised this business and she must be held to have contracted to carry any person who should present himself with a ticket, provided there was no valid objection. The fact that no stops were made on the way and that the passengers were led by motives of pleasure, curiosity or a desire for information on matters connected with the local, state or national history rather than by any private business exigency or convenience is of no consequence. The automobile was large, carried many passengers and was wholly within the control of the driver.

It is apparent that this business much more resembled a public than a private carriage of passengers, and, whether in a strictly technical sense the defendant could be regarded as a common carrier of passengers or not, we are of opinion that she was bound to use reasonable care according to the nature of the contract, and that in view of the nature of the business and the peril to life and limb of the passengers likely to arise from an accident, this reasonable care should be defined as the highest degree of care consistent with the proper transaction of the business. See the discussion of reasonable care by Sheldon, J., in *Gardner v. Boston Elevated R. Co.*, 204 Mass. 213, 216, 90 N. E. 534, and cases cited; also, *Galligan v. Old Colony St. Ry.*, 182 Mass. 211, 65 N. E. 48, and *Warren v. Fitchburg R. R.*, 8 Allen (Mass.), 227, 233, 3 Am. Neg. Cas. 748, 85 Am. Dec. 700. The language of the presiding justice was sufficiently favorable to the defendant.

Exceptions overruled.

complaint which alleges that the defendant, who is a dealer in automobiles, at the request of the plaintiff, sent a servant to repair plaintiff's automobile which had become disabled upon the road and to bring it into the city, that the man so sent had absolute charge of the car, that he was incompetent and unskilled, and so negligently, carelessly and recklessly operated the car that it was overturned, in consequence of which the plaintiff

suffered personal injury. The complaint was held not to be subject to demurrer for the failure of the plaintiff to aver that she had promised to pay the defendant for the service of the man so furnished, since, in averring that she requested defendant to furnish her with a competent chauffeur and that defendant had agreed to do so, the implication clearly arises that the plaintiff was to pay for such service. *Gresh v. Wanamaker*, 221 Pa. 28 (1908).

TOMASELLI v. SACCO.

[U. S. CIRCUIT COURT OF APPEALS, RHODE ISLAND, MARCH 8, 1912.]

194 Fed. 398.

Master and Servant—Injury to Servant—Caving in of Earth—Failure to Warn.

In an action brought to recover damages sustained by a workman while engaged in digging a ditch for sewer purposes, evidence held to justify a finding that the employer, who knew of the dangerous condition of the soil, was guilty of negligence in failing to warn the servant who was ignorant of its condition.

Error to the Circuit Court of the United States for the District of Rhode Island, brought by both parties to review a judgment rendered in an action for personal injuries caused by the caving in of a ditch. Affirmed as to defendant's petition in error; plaintiff's petition dismissed.

For plaintiff—Patrick P. Curran, (John E. Canning, and Comstock & Canning, on the brief).

For defendant—Alexander L. Churchill, (Walter B. Vincent, Henry M. Boss, Jr., Ralph T. Barnefield, and Vincent, Boss & Barnefield, on the brief).

ALDRICH, DISTRICT JUDGE. In this case the plaintiff below sought to recover for personal injury received while engaged in the work of digging a ditch for sewer purposes in East Providence. The work was under the general management of Tomaselli, who was carrying it forward under a contract.

It appeared from the evidence that some years before a ditch had been dug through the same street for water pipes, and the new ditch was being dug by the workmen at the time the plaintiff was injured was running parallel to it and within a very few feet of it. The evidence tended to show that its fill was of such a character as to render the new ditch more likely to cave in, and the evidence was

NOTE.

On the subject of Duty of Master to Warn and Instruct Servant, see note in 16 Am. Neg. Rep. 137.

And on the Duty to Furnish Servant Safe Place to Work, see note in 12 Am. Neg. Rep. 251.

And for the general law on these topics, see Vols. 13-16 Am. Neg. Cas.,

where the Master and Servant Cases decided in the courts of last resort of the States and Territories, from the earliest period to 1896, are arranged and classified. For subsequent cases to date see Vols. 1-21 Am. Neg. Rep., and this volume (1 N. C. C. A.) and succeeding volumes of the Negligence and Compensation Cases Annotated.

such as to warrant the jury in finding that Tomaselli knew about its existence and that the injured workman had no knowledge of it. Tomaselli furnished lumber for shoring the new ditch, something which is often used in ditches to prevent their caving in; but none had actually been used in the new ditch at the place of injury. The evidence also tended to show that dirt replaced in a ditch never resumes its original conditions of solidity and strength, and the fact of the existence of the old ditch so near the one which was being dug presented an element of hazard, because the earth between the two was liable to topple over, and the evidence tended to show that the caving in occurred because there was only a narrow strip of solid, virgin earth between the old ditch and the new. All questions under the first, second, and third counts were ruled against the plaintiff, and the single point saved to him was founded upon an alleged duty to warn the workmen in respect to the old ditch. Under the evidence we think such conditions were described as would entitle the plaintiff to recover, provided the facts were found in accordance with that theory of danger. The instructions to the jury were full and comprehensive, and all questions about the shoring and the failure to use the shoring, and all fellow-servant questions, were expressly removed from the case, and the simple question submitted to the jury was whether the defendant should have warned the workman of the hidden danger, to the end that he might have seen for himself and have guarded against the danger as the new excavation proceeded. We perceive no error in the statement of the learned judge in respect to what was said about the duty, and he left it to the jury to say whether under all the circumstances the master fully discharged his duty to the laborers by informing them of the hazard which he knew, and which was not within the knowledge of the workmen.

The only legal proposition involved in what was submitted had reference to the duty upon the employer to tell the employee of the hazard not visible, but which he knew about, and that proposition was made to depend upon the facts whether there was danger, whether the superintendent knew it, whether the employee did not know it, and whether warning would have safeguarded him. We see no error in the legal proposition, and under the instructions the facts must have all been found against the defendant, in order that a verdict for the plaintiff should have been reached.

In No. 943, the judgment of the Circuit Court is affirmed, with interest and costs.

In No. 944, the plaintiff's right of recovery having been established in No. 943, there is no necessity for reviewing the questions ruled against him in respect to the first, second, and third counts, and the writ of error in No. 944 is dismissed, without costs, as it has become a moot case.

ENGELKING v. CITY OF SPOKANE.

[SUPREME COURT OF WASHINGTON, AUGUST 1, 1910.]

59 Wash. 446, 110 Pac. 25.

1. Master and Servant—Supervision—Assumption of Risk.

A common laborer who has been directed, with others, to construct a raft and float it in the current of a stream a short distance above a falls, on which he, with the others, was to stand for the purpose of removing the false work underneath a bridge in process of construction by defendant, does not assume, as matter of law, the risk of injury caused by the action of the current upon the raft and mooring line, so as to bar a recovery by his administratrix for his death caused by the raft being torn from its fastenings, thereby causing him to be carried over the falls.

2. Master and Servant—Mooring Raft in River—Superintendence—Liability.

It is the duty of a master to furnish a skilled superintendent to take charge of the construction of a raft and the mooring of the same in a stream having a rapid current, at a short distance above a falls, on which common laborers are directed to stand for the purpose of removing the false work underneath a bridge, and in case of the master's failure to provide such superintendence, he will be held liable for the death of the laborers caused by the action of the current in tearing the raft from its moorings and carrying them over the falls.

3. Municipal Corporations—Construction of Bridge—Ministerial Duty—Injury to Employee—Liability.

In constructing a bridge over a stream as a portion of its highway system, a municipal corporation acts in its ministerial capacity, and is, therefore, liable for the negligent death of a common laborer employed in the work.

Appeal by defendant from a judgment of the Supreme Court of Spokane County, rendered in favor of plaintiff in an action brought to recover damages for the alleged negligent death of plaintiff's intestate. Affirmed.

CASE NOTE.

Duty of Master to Furnish Superintendence For Dangerous Work.

- I. IN GENERAL, 142.
- II. ABSENCE OF FOREMAN, 146.
- III. STATUTORY REQUIREMENT, 150.

I. In General.

It appears to be well settled that a master will be held liable for injuries to his servants due to his failure to furnish a competent superintendent or foreman, when the work to be per-

formed is dangerous and requires the presence of some skillful person in order to insure safe performance of the undertaking.

Bailey on Personal Injuries, section 615 (edition 1912) says: "The court recognizes, as one of the duties to be performed by the master, that of bringing to the accomplishment of a dangerous work requisite skill and superintendence,—to provide and keep present one possessed of such, to superintend and direct the work."

"The master must be held respon-

For appellant—E. O. Connor, and Danson and Williams.

For respondent—Robertson & Miller, and Harry Rosenhaupt.

CHADWICK, J. At the time of his death H. W. Engelking was a common laborer in the employ of the city of Spokane. The city was engaged in erecting a concrete bridge over the Spokane river, a short distance above the falls. The bridge had been so far completed as to warrant the removal of the false work sustaining the arches, of which there were several. High water had taken out the false work from under the second arch, and the wooden forms had been moored by cables to the Great Northern Railway bridge, a structure which paralleled the city bridge about 200 feet up the stream and to the east. These forms were lying near the shore, with the bow of the arch to the center of the stream. In consequence, the flow of the current along the shore line was naturally deflected toward the center arch of the city bridge. A few feet below the concrete structure, a temporary bridge had been erected. A part of this had gone out a short time before, but it was in place below the south arch, so that anything floating under the south arch would lodge against it and thus be prevented from being carried over the falls. Engelking and four others were directed by the foreman in charge for the city to take some timbers then at hand and make a raft, to be floated down under the south arch and upon which they could stand while removing the false work. No further direction or superintendence was given or had over the men, although one of their

sible," said the court in *Hill v. Big Creek Lumber Co.*, 108 La. 162, 12 Am. Neg. Rep. 256, 58 L. R. A. (1902), "for such reasonably constant and steady supervision of his work that they will not be permitted to become grossly or criminally negligent. He is in a position to exercise that supervision; no other person is."

The fact that some slight inconvenience or expense may be caused by employing a superintendent can have no weight in a matter affecting the safety of employees. *Trainor v. Phila. R. R. Co.*, 137 Pa. 148 (1890). In this case the master was held liable for an injury received from the fall of a coal derrick, where the work of moving the

derrick required the superintendence of a competent foreman, but instead of providing such a person the master left the laborers to manage the work themselves.

And in *Doyle v. Melendy*, 83 Vt. 339 (1910), which was an action by a servant to recover damages for injuries caused while removing a king-pin connecting a boiler to the front axle of a truck on which it rested, the court said that it was unnecessary for the plaintiff to allege that the master knew that another servant was incompetent, where such servant was charged with the performance of an absolute duty owing by the master to the servant, "like the duty of providing necessary supervision for

number "seemed to take the lead." Accordingly the men took eight sticks, 10 by 10, with cross-pieces leaving a space between each two of them, so that when the framework was completed the raft was about 14 feet wide and 20 feet long. Upon this they erected a superstructure to bring them within reach of the top of the arch. When the raft had been completed it is estimated that it weighed from 8,000 to 9,000 pounds. Between the moored arches and the south span of the bridge, there was an eddy in the stream. In this, and about 30 or 40 feet above the city bridge, the raft was moored; that point being also about 60 or 65 feet south of the pier upon which the center and south arches centered. The raft had been let down into the eddy and was secured by a long rope, two inches in diameter, attached to the Great Northern bridge, about 75 feet from the shore. The other ropes were attached to the raft. There is testimony going to show that one of these should have been used as a guy rope, to be held or tied on the shore while the raft was let down under the arch; while the other was to be used in securing the raft to the bridge. On the other hand, there is testimony showing that the large cable was alone depended on to let the raft down, while both of the smaller ones were intended to secure the raft to the bridge when in proper position. The jury having found for plaintiff, we shall accept her theory as the true fact in the case. When all was done, one of the workmen crossed the river to get some tools.

a complicated and dangerous service." But the court remarked that "such an allegation was necessary if the case was to stand on some shortage of Fellows in a matter wherein he was merely a fellow servant, although the foreman, if in such a case the defendant would not be liable for a default of Fellows unless he was negligent in employing him."

It was held in *Haworth v. Seevers Mfg. Co.*, 87 Iowa, 765, 14 Am. Neg. Cas. 601n (1892), that the master must exercise reasonable care to have the work of constructing platforms on which men are to stand to perform such work as putting rafters in a building, done by or under the supervision of men who were qualified to provide for the safety of the employees. The court recognized the right of the

master himself to manage the work, if competent to do so.

In *Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376 (1910), which was an action for personal injuries sustained by a longshoreman who was struck by a sling load of lumber, the approach of which no warning was given, while he was engaged in loading a schooner, the court said: "The business of loading the schooner with lumber could not be safely carried on without supervision on the part of some one. When, therefore, the master undertook to supervise the work, it was bound to exercise ordinary care in the performance of the duty and its failure so to do renders it liable to its servants for injuries caused thereby. The servant did not assume the risk of injury caused by its neglect."

And in *Reynolds v. Barnard*, 168

Another went up to the Great Northern bridge to man the cable, the end of which was wrapped around a batter post on the Great Northern bridge. While the workman was going up the bank of the stream to man the cable, the rope which snubbed the raft to the shore was cut loose, so that when he first observed the raft after reaching his post, it was drifting up and out into the stream, carried up on the eddying waters, and out by the long sweep of the 250 foot cable, the most of which was submerged and a part of which had been struck by the main current of the stream. The cable described a sweep or curve so that, at some time, the segment of the curve must have been below or to the west of the upper end of the raft. Whether Engelking and one of his companions pushed the raft out with pike poles is a disputed fact, but not material as we view the case. As the raft caught the swift current, the force of the current fell upon the cable, drifted the raft rapidly out to the center, and, as soon as the cable straightened out, pulled it under the surface. Those on the raft having no means of controlling it, the workman on the bridge was signalled to let out more rope, and when he did so the raft rose to the surface, but when the rope came taut the raft was again pulled under the water, this time about $2\frac{1}{2}$ feet or three feet, or to the waistline of the men thereon. This continued until the workmen could no longer hold the rope, and the raft, being then opposite and almost under the center arch, was carried through it and over the falls. One of the workmen escaped and was a witness at

Mass. 226, 2 Am. Neg. Rep. 22 (1897), in which the plaintiff, who was a slater, was injured by the collapse of a staging fastened to the roof of a building a few feet below the ridge pole, caused by being overloaded with slate, the court said that it cannot be held "as matter of law, that the careful oversight of the work by a superintendent would not have prevented the loading of the staging with slate to such an extent as to make it dangerous. It was conceded that the defendant's son was foreman of the job, and that he had charge of it; and, in the opinion of the majority of the court, this was enough to justify the plaintiff in his connection that it was a question for the jury whether the principal duty of a foreman was

not of superintendence, notwithstanding the testimony that he did manual labor, and was laying slate on another section of the roof at the time of the accident. The fact that the person in charge does manual labor is not conclusive upon the question whether his principal duty is that of superintendence."

It is actionable negligence for a master to neglect to provide a signalman to direct the movements of an engineer in charge of a skip or iron bucket, operated by means of a derrick and engine and used to excavate earth, where, as a result of such failure, a workman was injured by the skip being lowered upon him when loaded with material, the station of engineer being such that he could not

the trial. The other two lost their lives. This action is prosecuted by the widow of Engelking, and from a judgment in her favor the city has appealed.

Counsel for appellant has aptly summarized the theories upon which a recovery was sought and must rest if sustained. He said: "(1) That these 10x10 timbers, forming the foundations of the raft, had a month previous, been green timbers, and had, during the month preceding, been lying in the water. (2) That the rope by which the raft was moored to the Great Northern bridge was too heavy. (3) That there was no foreman over these men and in charge of the construction of the raft." The first two grounds may be summarily disposed of. It may be conceded, for the testimony shows, that the raft and the ropes would, under ordinary conditions, or under the anticipated conditions—that is, if the raft had been floated under and moored beneath the south arch—have been a sufficient and proper appliance. The scheme failed because the workmen did not appreciate the danger arising from the submerged cable, the rapid flow, and conflicting currents of the stream which carried the raft beyond the south arch and opposite the center arch, and the further fact that the strength of the current was sufficient to pull the raft under the water when its weight came squarely upon the rope.

It is argued that these things resulted because of natural laws

see the place of excavation, the place of unloading or the men as they were engaged at work. The evidence in this case does not show that the signal to the engineer was given by any one. *Stewart v. Stone & Webster Engineering Corp.*, 44 Mont. 160 (1911).

But a master who maintains a passenger elevator in his department store and who had properly instructed the operator of the car not to move the same while the shaft was being cleaned by a servant, is not required to employ a watchman to see that the operator obeys the instruction, and is, therefore, not liable for injuries to the servant caused by the counter-weights of the elevator striking him when the operator negligently started the car. "If it may be said that it was the duty of the defendant at common law to hire another employee to watch the

elevator operator," said the court, "then it is difficult to see where that duty would end, for as well might it be said that the jury might speculate and say that the further duty devolved upon the defendant to employ still another watchman to watch the first and see that he performed his duty, and the number of employees to be thus employed to see that other employees performed their duties would in each case depend upon the opinion of the jury with respect to the particular facts." *Kennedy v. Wanamaker*, 145 App. Div. 428, 129 N. Y. Supp. 1053 (1911).

II. Absence of Foreman.

Some cases hold that a master does not perform his full duty to his servants by merely furnishing a superintendent, but impose liability upon

known to all, and that, by an exercise of the faculties with which all men are endowed, the danger would have been foreseen and avoided. *Beltz v. American Mill Co.*, 37 Wash. 399, 79 Pac. 981; *Bier v. Hosford*, 35 Wash. 544, 17 Am. Neg. Rep. 153, 77 Pac. 867, and *Cavaness v. Morgan Lumber Co.*, 50 Wash. 232, 96 Pac. 1084, are cited to sustain this contention. Notwithstanding the forceful argument of counsel, the cases cited cannot be made to apply here. The workmen were directed to meet, not an ordinary, but an extraordinary, condition. 1 *Labatt, Master & Servant*, 240; *Anderson v. Columbia Imp. Co.*, 41 Wash. 83, 82 Pac. 1037, 2 L. R. A. (N. S.) 840. It is true that, as viewed by learned counsel and by those versed in the laws of mechanics, the result might have been expected as a consequence of the violation of natural laws. But it is not to be expected that a common laborer will have knowledge of, or be bound by, natural laws, unless they are so obvious as to prompt the instinct of self-preservation in men of ordinary prudence and understanding. The wonders of this age of invention come from the application of natural laws. The touch of genius rather than the strength of reason has unlocked their mysteries, so that even learned men would not be charged with knowledge of them. Men are not bound to observe or act upon natural laws, unless they are within the range of common understanding. That four men acting in harmony, having no understanding that the cross-currents and torrential flow of the stream striking against a two-inch cable would overcome the natural law which held the raft in its place before it was pushed out into the stream, is the best evi-

him for injuries which are the direct result of the failure of the superintendent to remain at the point of control during the full performance of the work. See *Bailey on Personal Injuries*, § 615 (ed. 1912). Thus, in *Gerish v. New Haven Ice Co.*, 63 Conn. 9, 13 Am. Neg. Cas. 700 (1893), it appeared that the plaintiff was a servant of the defendant company, employed in hauling ice from a pond into an ice house by means of machinery operated by a steam engine, and in adjusting some of the machinery which had become out of order, was obliged to occupy a position of great danger if the engine, which had been stopped for the purpose of remedying the trouble, should be started. There was a

rule of the company, known to all employees, that the superintendent should stand at a certain place where he could oversee all of the work and operate a bell cord by which he could signal the engineer to stop or start the engine, as occasion required. At the time of the accident, the superintendent had left his post to procure some appliance needed in adjusting the machinery, when by some unexplained accident the bell cord was pulled and the engineer started the engine, thereby causing plaintiff serious injury. In an action to recover damages for injuries thus sustained, the court held that the master was guilty of negligence, and thereby liable for the injury sustained, both in failing

dence that they are not to be charged with the assumption of risk or contributory negligence, as a matter of law; for, if they knew or appreciated the danger the instinct of self-preservation, which is the first law of nature, would have restrained them. In any event, it is a question upon which the minds of reasonable men may differ, and the jury having found by special verdict that Engelking and his companions did not appreciate the danger satisfies us that he was not guilty of assumption of risk or of contributory negligence.

The weight of the raft, the heavy rope, the current of the stream, and the proximity of the falls, made the superintendence of a qualified person an imperative necessity. In *Anderson v. Globe Navigation Co.*, 57 Wash. 502, 107 Pac. 376, we held that the business of loading a schooner with lumber could not be carried on without superintendence. While this case is not in point upon the fact, it nevertheless furnishes a source from which the legal conclusion may be drawn that the duty of superintendence is not a fixed legal duty, but may arise from the facts of any given case. In that case the servant was entitled to immediate and watchful care of one who could warn him against dangers that he could not foresee. In this, the servant was entitled to the superintendence and direction of a skilled person, so that dangers which would not be foreseen by a person of only common understanding might be avoided. The hazard was extraordinary. “* * * When the servant is thus required to work amidst new surroundings or to undertake new duties, the master becomes at once chargeable with the obligation of giving him instructions in any case where there is a real augmentation of the risks, owing to the fact that the servant has not sufficient experience or intelligence to enable him to safeguard himself.” *Labatt, Master & Servant*, p. 541. “It is the duty of the master to supervise, direct, and control the operation and management of his business so that no injury shall ensue to his

to observe its own rule to have the superintendent at his post, and for the latter's negligence in leaving his post without placing some competent person in charge.

The same doctrine was applied in *McElligott v. Randolph*, 61 Conn. 157, 16 Am. Neg. Cas. 712, 29 Am. St. Rep. 121 (1891), in which the court said that where the master employs a fit and competent agent to take charge of the performance of certain work, his duty is not done until the agent

acts up to the limit of the master's duty. In this case it was held that the fact that ropes of insufficient strength were selected by a fellow servant of plaintiff's intestate for the purpose of removing a wheel weighing upwards of twelve tons, although the master had furnished ropes in a place near by which were of sufficient strength for the purpose intended, will not defeat a recovery for the death of a servant upon whom the wheel fell because of the insufficiency of the rope

employees through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor." Thompson, Negligence, § 3805.

That it is the ordinary and not the extraordinary danger arising from the violation of some rule of science or mechanics not likely to be appreciated by the man of ordinary prudence, which binds the servant to the law of assumption of risk, is the logic of *Cook v. Chehalis River Lumber Co.*, 48 Wash. 619, 94 Pac. 189, where the court said: "The rule undoubtedly is that a servant assumes the risk of injury from dangers incident to his employment which are apparent to him and which the master does not undertake to remedy as an inducement to keep the servant at work, or is under no duty of positive law to discover and remedy. But this doctrine, it seems to us, has no application to the case before us. Here, clearly, the danger causing the injury was not one ordinarily incident to the employment. On the contrary, if the respondent's evidence is to be believed, the injury was caused by the grossest kind of negligence on the part of the appellant's foreman who was in immediate charge of the work. He directed a thing to be done which the slightest investigation must have told him would be highly dangerous to both of the men who were engaged in work at the foot of the trestle. The tightening of the rope, in the position it was placed by his orders, must necessarily throw off the planking from the projecting timbers, and it was gross carelessness to do this without warning the men below of their danger. This danger was not, therefore, a danger incident to the employment. It was one caused by the negligent acts of the appellant's foreman, and one which he could have avoided by using even ordinary prudence."

to hold it in place, where it appeared that the workmen possessed little mechanical skill, but were competent to perform the work under the direction of the foreman furnished by the master, and that the foreman went home before the work was completed, leaving the workmen to finish the undertaking alone.

But, in *National Tube Works v. Bedell*, 96 Pa. 175 (1880), it was held on appeal that the trial court erred in holding that the temporary absence of the superintendent of a rolling mill, at the moment an employee was injured

by the breaking of a hook used in adjusting a fly wheel, was negligence rendering the master liable for injuries so sustained.

And in *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, 63 L. R. A. 460 (1903), it was held that a master is not bound to have a superintendent present at every moment at the place where work is being carried on, in order to keep safe the place which an employee may chance to occupy, as against possible negligence on the part of other employees.

Many cases are cited by counsel on both sides, but, inasmuch as this case depends upon general and obvious rules of law, it would extend our opinion to an inordinate length to review them.

Among other instructions complained of, the following is vigorously assailed: "The law also provides that the servant is held to assume the ordinary risks usually incident to his employment so far as they may fairly be presumed to be within his knowledge in the exercise of ordinary care, *provided the master has used ordinary diligence to eliminate them.*" It is insisted that the italicised part denies to appellant its defense of assumption of risk. We are not advised as to the theory of the court in injecting the words objected to, and if this instruction stood alone it might not be sufficient for the guidance of the jury. Its meaning is not plain but in other instructions, not in one but in a number, the law of assumption is clearly set forth, so that upon the entire charge the jury could not have been misled. The verdict being consistent with the evidence, we had rather believe that the jury followed the true rule, emphasized as it was by the repeated utterances of the court than that it was governed entirely by what seems to us to be a misprision on the part of the court. *Hoseth v. Preston Mill Co.*, 49 Wash. 682, 96 Pac. 423. Objections are made to other instructions, but we think they state the law when considered in connection with other instructions, and are consistent with the law of the case as we have found it to be.

Lastly, it is contended that the city cannot be held liable because it was acting in a governmental capacity, and not in the capacity of a private corporation. While there is a diversity of opinion and a divided authority upon this question, it seems to have been settled by this State that the construction and repair of highways is to be regarded as a ministerial rather than a governmental function, and that the city is therefore answerable for its negligence. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; *Prather v. Spokane*, 29 Wash. 549, 70 Pac. 55, 59 L. R. A. 346, 92 Am. St. Rep.

III. Statutory Requirement.

In West Virginia a statute requires companies operating coal mines to employ competent "fire bosses" to examine all safety lamps used by miners working in places where dangerous and noxious gases are known or liable to exist, and to employ a competent mining boss to keep a careful watch over the ventilating apparatus provided for

mines. *Graham v. Newberg Orrel Coal & Coke Co.*, 38 W. Va. 273 (1893). It should be noted that the liability of a master for injuries due to his failure to perform a duty expressly imposed upon him by statute, is different and generally greater than the duty imposed upon him by the general principles of the law.

923. In *Cunningham v. Seattle*, 40 Wash. 59, 42 Wash. 134, 19 Am. Neg. Rep. 55, 82 Pac. 143, 84 Pac. 641, 4 L. R. A. (N. S.) 629, the case upon which appellant principally relies, the distinction between that case and the case at bar is noted by a quotation from *Sutton v. Snohomish*, *supra*: "In the first place, we are of the opinion that the laying out, repairing and controlling of streets by a chartered municipal corporation does not call forth the exercise of strictly governmental functions. In the performance of such duties, however imposed, the municipality acts primarily for the benefit of the inhabitants of the particular locality. In preserving the peace, caring for the poor, and preventing the destruction of property by fire, and preserving the public health, it assumes duties which are said to be in their nature solely governmental (Jones on Negligence of Municipal Corporations, c. 4), and for the nonexercise or negligent exercise of which the corporation is generally liable to individual citizens. But the duty to keep streets in repair is a municipal or ministerial duty, for a breach of which an action will lie in favor of a party injured thereby. *Denver v. Dunsmore*, 7 Colo. 328 (3 Pac. 705)." Whether the reasoning employed to draw the distinctions between the *Sutton Case* and the case of *Cunningham* be good or bad, it is the established law in this State, and we are not disposed to question it in the absence of legislative direction. This conclusion makes it unnecessary for us to notice specifically other assignments of error; they being covered by the general propositions advanced.

The judgment of the lower court is affirmed.

RUDKIN, C. J., and GOSE, and FULLERTON, JJ., concur.

BLANCHARD v. VERMONT SHADE ROLLER CO.

[SUPREME COURT OF VERMONT, MAY 8, 1911.]

84 Vt. 442.

1. Master and Servant—Assumption of Risk—Promise of Protection.

An employee engaged in cleaning out an elevator pit in reliance upon an undertaking of the superintendent to protect him in respect to the operation of the elevator, does not assume the risks attending the ordinary use of the elevator.

2. Master and Servant—Superintendent—Vice-Principal.

A superintendent in entire charge of a factory and its employees, has authority to promise protection to a servant at work in an unsafe place.

3. Master and Servant—Superintendent—Fellow Servant.

The superintendent of a factory in attempting to fulfill a promise to protect a servant at work in an unsafe place, is not a fellow servant, where the protection is to be secured by an exercise of his authority as superintendent.

4. Negligence—Proximate Cause—Fellow Servant.

The careless act of a fellow servant in permitting a truck to fall into an elevator well at a time when a co-employee is engaged in cleaning the pit, is not the sole proximate cause of the latter's injury, where the superintendent failed to fulfill his promise to leave the elevator in place for the employee's protection.

5. Appeal—Instruction—Fellow Servant.

Failure clearly to charge that the person inflicting the injury complained of was a fellow servant, is not prejudicial, where, even if he were, the master would still be liable.

6. Appeal—Question for Jury—Error.

Appellant cannot properly claim that a question submitted to the jury should have been disposed of as matter of law, when to do so would have required that an error be made in his favor.

7. Appeal—Instruction—Damages.

An instruction in an action to recover for personal injuries allowing the one injured to recover sums expended and to be expended by him is not erroneous,

NOTE.

On the subject of Assumption of Risk, see notes in 5 Am. Neg. Rep. 22; 7 Am. Neg. Rep. 72, 97, 588; 8 Am. Neg. Rep. 71, 90, 183, 638; 9 Am. Neg. Rep. 196, 280, 306, 467; 10 Am. Neg. Rep. 212.

And on the subject of Injuries to Employees after Promises to Repair, see note in 16 Am. Neg. Rep. 503.

And for the cases covering these

subjects from the earliest period to 1896, see Vols. 13-16 Am. Neg. Cas. where the "Master and Servant Cases" decided in the courts of last resort of the States and Territories are reported and arranged and classified in alphabetical order of States; and for subsequent cases to date see Vols. 1-21 Am. Neg. Rep., and this volume (1 N. C. C. A.) and succeeding volumes of Negligence and Compensation Cases Annotated.

although there is no evidence of what had been expended, where no exception was taken as to past expenditures and nothing is claimed as to future expenses.

8. Pleading—Promise—Misjoinder.

An averment in a declaration by a servant in an action for personal injuries, that the master failed to take certain action for the servant's safety as he had agreed, promised and assumed, does not make the count one in *assumpsit* and, therefore, objectionable as improperly joined with the other counts.

9. Trial—Motion in Arrest—Defective Count.

That a count in a declaration is fatally defective, will not sustain a motion in arrest where there are good counts upon which the verdict for plaintiff might have been based.

10. Pleading—Promise—Consideration.

In an action by a servant for personal injuries, no consideration for the master's promise to protect the servant in his work need be alleged or proved.

11. Evidence—Variance—Videlicet.

A party need not prove the precise circumstances averred after a *videlicet*.

Exceptions by defendant to rulings of the County Court of Addison County, made during the trial of an action brought by Henry L. Blanchard to recover damages for personal injuries alleged to have been caused by a truck falling through an unenclosed elevator opening, which resulted in a judgment in favor of the plaintiff. Affirmed.

For plaintiff—F. W. Tuttle and F. L. Fish.

For defendant—Brown and Hopkins, and V. A. Bullard.

MUNSON, J. The plaintiff, an adult employee in the defendant's shade roller factory at Vergennes, while at work throwing out rubbish from the elevator pit, was injured by a truck which came down through an uninclosed elevator opening in the floor above. He had worked in the factory 12 years, during the last 10 of which he had kept the boiler fires, and in connection with this had gathered the refuse wood from all parts of the building. In doing this work he had used the elevator, and had become familiar with the manner and extent of its use by the other employees; had seen the number of men at work and the number of trucks in use on the floors above the basement, and must have seen how the trucks stood and were handled in the vicinity of the elevator openings. The conditions affecting the safety of one working in the pit were the same during this period as on the day of the accident. It thus appears from undisputed evidence that the plaintiff engaged in this work with full knowledge of

the risks ordinarily attending it; and, if the case is to turn upon this point, it will be necessary to say that the plaintiff assumed the risk and cannot recover.

But the testimony of the plaintiff as to the circumstances in which he was doing the work introduced another element. He states in substance, that the work was being done on this occasion by direction of Graves, the superintendent, and in his presence; that when he entered the pit the elevator was standing at the first floor above, with the bottom even with the floor; that when Graves sent the elevator up to that point some one came along and said: "You ought to put slats under the elevator to keep it from coming down;" that thereupon Graves, who was standing close to the rod which controlled the elevator, said, "No, Henry, I am going to be here, and will be on the lookout for you;" that he went on with his work relying on what Graves said, and did not know when the elevator went up from the floor above. Graves denied that there was any such talk as that testified to by the plaintiff, and testified that when the plaintiff entered the pit the elevator was in the top floor instead of the middle floor, but said that he stood right by the elevator rod all the while, and kept his hand upon it until some one above signaled that he wanted to use the elevator, when he permitted it to go, and that when he did this he told the plaintiff to step out of the pit, and that he did so, but stepped back too quick. These statements were evidence tending to show that the plaintiff was doing the work in reliance upon an undertaking of the superintendent to protect him in respect to the operation of the elevator; and a finding of this fact if unaffected by other considerations, would relieve the plaintiff's conduct of the effect it would otherwise have as an assumption of the risks attending the ordinary use of the elevator.

The defendant contends that Graves had no authority to promise plaintiff that he would give him this protection. The defendant is a corporation, with its principal office and managing official located at Burlington. This official testified that he went to the factory as occasion required—it might be twice in one week and might be once in three months. It is apparent from all the evidence that Graves had the entire charge of the factory and help. As far as the conditions affecting the safety of the employees depended upon a master's oversight and direction, he stood in the place of the defendant. The assurance he gave the plaintiff was incident to the proper management of the business.

It is said further that, if Graves had authority to make this arrangement, he was nevertheless a fellow servant of the plaintiff in

attempting to carry it out, and that the defendant is not responsible for his failure therein. The defendant relies in support of this contention upon *Brown v. People's Gaslight Co.*, 81 Vt. 477, 71 Atl. 204, 22 L. R. A. (N. S.) 738; but we think that case is not in point. This undertaking was a means adopted to make safe for the occupancy of the plaintiff a place that was otherwise unsafe; and neither the place nor the use to be made of it had any relation to the progress of a work of construction. The danger to be incurred if the plaintiff was left unprotected was not one in any way connected with his work, but one due to an existing condition for which the defendant was responsible. The protection promised was to take the place of the ordinary safeguard, the presence of which might have hindered the defendant's work, but the absence of which made the place unsafe; and the plaintiff was entitled to one thing or the other unless both were waived. The supervision was undertaken and exercised in circumstances which indicate that the plaintiff proceeded, and was understood to proceed, in reliance upon it. The protection was not to be secured by performing the duty of a workman, but by an exercise of that control which was a prerogative of the superintendent. In carrying out the arrangement, as well as in making it, Graves must be considered the representative of the defendant.

But the defendant claims that the act of Graves in permitting the elevator to be moved was not the proximate cause of the plaintiff's injury; that the proximate cause was the careless act of the fellow-servant who sent the truck into the space left open by the moving of the elevator. We think the case is one of concurrent causes. The permission to move the elevator and the careless handling of the truck co-operated to produce the injury. The falling of the truck was the immediate cause of the injury; but it was not the sole proximate cause, for the failure of the defendant to guard the plaintiff against the happening of such an accident concurred in producing the injury. The falling of a truck through an uninclosed opening in a floor, occupied as this was, was something which might reasonably be expected to occur, and something which could not occur if the opening was kept closed.

The points thus far considered were made the grounds of a motion for the direction of a verdict; and the disposition made of them and the discussion connected therewith sufficiently dispose of the more general claims that there was no evidence of negligence on the part of the defendant, and none tending to show that the plaintiff was free from contributory negligence. It is claimed further that the undisputed evidence shows that the plaintiff knew, or ought to have

known, of every negligence complained of in the declaration as amended. But the evidence tends to show that he did not know of the movement of the elevator from the floor above him, and tends to establish facts that were an ample excuse for his not knowing it. Other points made under this motion will be more conveniently considered after examining questions raised by the motion in arrest of judgment.

The defendant argued certain exceptions taken to the charge. It follows from the views already expressed that the court was right in assuming that Graves' action was within his authority, and in submitting the question whether the plaintiff relied upon the assurance given.

It is said that the court should have charged that the mover of the truck was a fellow servant of the plaintiff. The court plainly assumed this in its charge; and, if there is a chance that the jury failed to understand it, the defendant is not harmed by it, for under the holding of this court the defendant is chargeable even though the mover of the truck was a fellow servant.

It is claimed that it was error to submit the question of proximate cause; that the court should have held that the proximate cause was the moving of the truck by the fellow servant, "or something else." Upon the defendant's theory, if the question was to be disposed of as matter of law, the holding should have been that the act of the fellow servant was the sole proximate cause of the injury. This would have been error, and the defendant cannot claim that an error should have been made in his favor. But, if the court had charged that the act of the superintendent was the sole proximate cause, this also would have been error, and, as regards this alternative, a submission which gave the jury an opportunity to determine the issue in the defendant's favor was not harmful.

The charge permitted the plaintiff to recover such sums as he had been called upon to expend for his recovery, and such sums as he might be called upon to expend in the future. Error is asserted on the ground that there was no evidence of what had been expended. But the case shows that no exception was taken as to past expenditures, and nothing is now claimed as to the charge respecting future expenditures.

The defendant urges in support of its motion in arrest that the first count is in assumpsit, and therefore improperly joined with the other counts. But we think the first count is in case. It sets up the relation of the parties, the general duties arising from that relation, including the duty of providing a safe place for the plaintiff to work

in, the respects wherein the place provided was unsafe, the matters which are claimed to have raised a particular duty in that behalf, the careless and negligent failure to perform that duty, and the resulting injury. It is true that the special duty relied upon was the fulfillment of a promise to take certain action for the plaintiff's safety, and that the defendant is alleged so to have agreed, promised, and assumed. But the use of these words in this connection and with reference to such an undertaking does not determine the nature of the declaration. It is argued that a breach is alleged; but the non-fulfillment of the undertaking is necessarily alleged to establish the negligence.

The motion in arrest is put upon the further ground that the second and third counts contain no allegation that the plaintiff was without knowledge of the acts of negligence therein alleged; and it is said in this connection that there was no evidence of such want of knowledge. It is true that the second count has no such allegation; but, if the omission is fatal to the count, it cannot avail the defendant, for the counts are all for the same cause of action, and the statute provides that in such a case the verdict shall be deemed a finding on the good counts only. P. S. 1505. The only negligence alleged in this count is the failure to protect the elevator shaft by suitable guards, and there certainly was no evidence that the plaintiff was ignorant of this fact. The third count covers also the special undertaking more fully set out in the first, and contains the usual allegation, "all of which was then and there unknown to the plaintiff." The question whether there was evidence to support this allegation as far as it relates to the special undertaking will be covered by the consideration of further points made under the motion to direct a verdict.

It is claimed under the motion for a verdict that there was no allegation nor proof of a consideration for the promise relied upon. The declaration being in tort for a misfeasance, no consideration was needed to give effect to the promise as a basis of recovery. Chitty, 383.

It remains to consider the further claim that there is a variance between the allegations of the first count respecting an agreement and the evidence received in support thereof, and that there was no evidence tending to support the agreement as alleged. It is argued that the agreement as alleged was to keep the elevator in the first floor above the plaintiff, and that the agreement shown was to keep the elevator from coming below that floor. The count alleges that the defendant promised

the plaintiff that it would protect him in his work, and would keep the elevator in a situation that would make the place safe; "that is to say," the defendant promised that it would keep the elevator in a fixed position in the floor immediately above the pit. The plaintiff testified that Graves said he would be there and would be on the lookout for him. Counsel argue, from the fact that this was said in recognition of a remark of some one that slats ought to be put under the elevator to keep it from coming down, that the undertaking was limited to guarding against that danger. But the language of Graves as testified to by the plaintiff, and Graves' testimony that when he let the elevator move he told the plaintiff to step out of the pit, were to be considered in connection with the situation as the plaintiff's evidence tended to establish it. It was for the jury to say what floor the elevator was in and moved from, and to apply the acknowledged act of the superintendent to the contested fact as thus determined. They were to find from all this evidence what the understanding was, and there was evidence from which they could find an understanding that the elevator should be kept in the first floor above. This would sustain the specific allegation of the *videlicet*. It was not necessary for the plaintiff to show an express undertaking corresponding substantially to the averment of the declaration, as the defendant argues.

It follows from what has been said that the answers in the plaintiff's deposition, tending to show that Graves undertook to keep the elevator at the first floor above, were admissible. Judgment affirmed.

STRAW V. PITTSFIELD SHOE CO.

[SUPREME COURT OF NEW HAMPSHIRE, FEBRUARY 7, 1911.]

— N. H. —, 79 Atl. 495.

Master and Servant—Injuries—Place to Work.

A master is not liable for injuries to a servant caused by being caught upon pins projecting from a revolving shaft, when using as a door a hole in a wall which was not intended for such use and which the master did not anticipate would be used as a place to work.

Action transferred from the Superior Court of Merrimack County, in which a verdict was rendered in favor of plaintiff for injuries sustained by coming into contact with a revolving shaft. Verdict set aside and judgment rendered for defendants.

For plaintiff—Remick & Hollis, Harry J. Brown, and Alexander Murchie.

For defendant—Streeter, Hollis, Demond & Woodworth.

DECLARATION.

In a plea of the case for that on, to wit, the 11th day of June, 1909, said defendant owned, managed and operated two certain manufacturing establishments at Pittsfield, known as a shoe factory, and a saw mill adjacent to said shoe factory, and said plaintiff was then and there in the employ of said defendant as a servant; that said defendant set said plaintiff at the work of drawing wood to said saw mill, of taking wood from the saw in said saw mill, and of assisting generally around said saw mill; whereupon it became, and was, the duty of said defendant then and there to provide and maintain for said plaintiff a reasonably safe place, reasonably safe machinery

NOTE.

On the subject of Accidents to Servants by Machinery, see note in 10 Am. Neg. Rep. 301.

And on the subject of Injuries to Servant Due to Failure to Cover Set-Screw, see note in 16 Am. Neg. Rep. 401.

And on the subject of Duty of Mas-

ter to Furnish Safe Place to Work, see note in 12 Am. Neg. Rep. 251.

And for a general classification of cases on these subjects see the "Master and Servant Cases" reported in Vols. 13-16 Am. Neg. Cas., being decisions from the earliest period to 1896 of the courts of last resort of the States and Territories, arranged in alphabetical order of States.

and appliances, a reasonably sufficient and suitable method of work, reasonable rules and regulations, and a sufficient number of reasonably careful and competent fellow-servants for the safety of said plaintiff in performing the duties of his employment, and to warn and instruct said plaintiff as to all defects and dangers of his employment; that said plaintiff was then and there in the exercise of due care.

Yet said defendant carelessly and negligently, and in breach of its duty to said plaintiff as aforesaid, wholly failed to provide and maintain for him a reasonably safe place, reasonably safe machinery and appliances, a reasonably sufficient and suitable method of work, reasonable rules and regulations, a sufficient number of reasonably careful and competent fellow-servants for the safety of said plaintiff in performing the duties of his employment, and to warn and instruct him as to all defects and dangers of his employment, but on the contrary then and there carelessly and negligently set said plaintiff to work as a part of his aforesaid employment in the yard at the rear of said saw mill, in an unsafe and dangerous place, with unsafe and unsuitable machinery and appliances, with an insufficient and unsuitable method of work, under unreasonable rules and regulations and with careless and incompetent fellow-servants, and insufficient number of helpers, and carelessly and negligently failed to warn and instruct said plaintiff as to any defects and dangers of his employment; that while said plaintiff was then and there passing from the shed of said saw mill to the yard in the rear thereof, and in the scope of his employment, and in the exercise of due care, on account of defendant's negligence, carelessness and breach of duty, aforesaid, the clothing of said plaintiff became entangled and caught upon a certain screw, pin or projection on an adjacent line of shafting, the plaintiff being then and there ignorant of the presence of said screw, pin or projection, and not having been warned or instructed with regard thereto, and said plaintiff was wound about said shaft, and was thrown violently against the floor and timbers, receiving severe external and internal bruises and injuries upon both legs, breaking his right leg, and rendering his left leg useless, on account of the defendant's negligence, carelessness and breach of duty aforesaid, so that said plaintiff suffered grievous mental and physical pain and anguish, and still suffers grievous mental and physical pain and anguish, and has not recovered from his aforesaid injuries, and has been thrown out of employment and been put to great expense for nursing and

medical attendance; to the damage of the plaintiff, as he says, the sum of \$50,000.

PEASLEE, J. The defendant's motion for a directed verdict was based upon the ground (among others) that the place where the plaintiff was injured was not one where his duty required him to be, or where the defendant ought to have anticipated he would go, and therefore it owed him no duty to make the place safe. He was injured by being caught upon pins projecting from a revolving shaft located nine inches from the rear wall of an open woodshed and nearly two feet above the ground. Timbers six inches square and about as high as the shaft formed the frame supporting it; the front timber being about three feet farther from the wall than the shaft, and the rear one a little outside the shed wall. Power was taken from this shaft to operate a wood saw. The saw was about five feet front of this frame, and so located that the man taking away from it stood in an open space at the end of the saw bench and in front of the frame carrying the driving shaft. The plaintiff had worked about this place some two years before the accident. He did not operate the saw, but assisted in handling the wood, drove a team, and did odd jobs about the premises. His eyesight was impaired, and there was some evidence that he was not of average intelligence.

There is no pretense that he had any occasion to go behind the front timber of the driving shaft frame before mentioned for the first year and a half of his employment. At the end of that time a hole was cut in the rear wall, so that the sawdust which accumulated in front of and to some extent under this frame might be more conveniently thrown out. This opening was 2 feet 10 inches wide by 3 feet 10 inches high, and the bottom of it was 18 inches above the top of the shaft. The boards that were cut out were made into a shutter to close the opening when it was desirable to do so. This shutter was not hinged to the studding, but had to be removed bodily. The opening was not made for a passageway for human beings, and the plaintiff never found occasion to so use it in the course of his work for the defendant until the time of the accident. He had, however, been through it on his own affairs more than fifty times, and had seen some of his fellow servants do so a few times. There was no evidence that the defendant knew of such use. Upon the day of the accident, the plaintiff, when inside the shed, had occasion to go behind it, and instead of going around, attempted to pass through this opening, and was caught upon the projecting pins and injured. His excuse for not going around was that there were woodpiles at either end of the shed,

so that he would have had to travel considerably farther.

Upon these facts there was nothing for the jury upon the question of work place. This was not prepared for one, had none of the appearance of one, and so far as the defendant knew had never been so used. There was but infrequent occasion for any one to go behind the shed. The way around the ends was not long, even when there was more or less wood piled there; while this opening was over three feet above the ground, and the approach to it was obstructed by the timber three feet from the wall and the revolving shaft near to it. The plaintiff claims that it could be found that the sawdust was quite deep there on the day of the accident, because he testified that he found it an easy step into the window. When it is considered that the plaintiff's statement to this effect applied to all the times he went through the opening, and to going in either direction, it is apparent that his ideas of an easy step are not such as his employer was called upon to take into account in considering what further obstruction it ought to put in the way of one predisposed to the use of this opening for a door. There is no evidence that the defendant was aware of his extraordinary agility, and unless it was it could not be expected to act in reference to it.

The evidence shows conclusively that the plaintiff was in a place where he had no business to be, and for the condition of which the defendant is not responsible to him. "A master's duty in respect to furnishing his servants a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing his work, and to such other parts as he knows or ought to know that they are accustomed to use while doing it." *Morrison v. Fibre Co.*, 70 N. H. 406, 408, 47 Atl. 412, 413 (85 Am. St. Rep. 634). Verdict set aside. Verdict and judgment for the defendants.

YOUNG, J., dissented. The others concurred.

NEWINGHAM v. J. C. BLAIR COMPANY.

[SUPREME COURT OF PENNSYLVANIA, JULY 6, 1911.]

232 Pa. 511.

1. Negligence—Action—Evidence—Use of Fire Escape.

In an action by a tinner and roofer to recover damages for personal injuries sustained by the fall of a defective fire escape used by him while in the employ of a contractor on defendant's building, evidence that plaintiff was inside of the building after defendant directed the workmen to reach the roof by way of the fire escape, and not by the elevator or stairway, was properly excluded as irrelevant.

2. Negligence—Action—Employee of Contractor—Injury—Defective Fire Escape.

In an action by a tinner and roofer to recover damages for personal injuries sustained by the falling of a defective fire escape used by him while in the employ of a contractor upon defendant's building, evidence that the defendant had notice of the defective condition of the fire escape and intended to give warning of its dangerous character, was properly excluded as irrelevant and immaterial.

3. Appeal—Failure to Raise Question on Trial—Instruction.

A party will not be heard to complain on appeal of the error of the trial judge in misquoting the testimony in his charge to the jury, when he failed to call the court's attention to the error before the jury retired.

4. Negligence—Employee of Contractor—Condition of Fire Escape—Care Required.

The fact that the servant of a contractor who had been employed to make certain repairs to the roof of defendant's building, used an elevator or stairway in the building in the course of his work in disregard of the orders of defendant, did not affect his right to rely on the safety of the fire escape which he was directed to use.

NOTE.**Liability for Defective Condition of Fire Escape as Place to Work.**

The owner of a building was held liable in *Winslow v. Commercial Bldg. Co.*, 147 Iowa, 238 (1910), for injuries sustained by the janitor of the building while engaged in painting the outside wall, in consequence of the negligence of an independent contractor in failing properly to fasten a fire escape to the building.

One who is sent to make an examination by another from whom the owner

of a building had requested an estimate of the cost of taking down the fire escapes thereon, it being necessary to go upon them in order to make the estimate desired, and who, while so engaged was injured by the fall of a fire escape upon which he stepped for the purpose of making the examination, is entitled to recover from the owner damages for injuries so sustained, if the owner knew that the fire escape was in a defective and dangerous condition. *Grill v. Gutfreund*, 65 Misc. 506, 120 N. Y. Supp. 86 (1909).

5. Negligence—Trial—Injuries from Giving Way of Fire Escape—Care Required.

In an action by a tinner and roofer to recover damages for personal injuries sustained by the fall of a defective fire escape while in the employ of a contractor on defendant's building, the refusal of the trial judge to charge that if the plaintiff jumped three and a half feet from the top of the fire wall to the floor of the fire escape, and so subjected it to an undue strain, he could not recover, did not constitute reversible error, where the court instructed the jury that it was for them to determine whether the plaintiff acted in the way an ordinarily prudent person would under the circumstances, and that if the negligence of the plaintiff contributed in any way to his injury, he could not recover.

6. Appeal—Failure to Raise Question on Trial—Carlisle Mortality Tables—Instruction.

A party will not be heard to complain on appeal of the failure of the trial court to give an instruction to the jury regarding the effect of the introduction of the Carlisle Mortality Tables in evidence in an action to recover damages for personal injuries, where he failed to request the court to give such instruction or to call the attention of the court to the omission.

7. Fire Escape—Dangerous Condition—Presumption as to Safety—Employee of Contractor.

A tinner and roofer in the employ of a contractor making certain repairs on the roof of defendant's building, who was directed and required by the defendant to use the fire escape in the course of his work, had a right to rely on the presumption that the defendant had performed its duty in providing a reasonably safe means of access to the roof, as an outside stairway.

8. Fire Escapes—Inspection—Presumption—Action.

In an action by a tinner and roofer to recover damages for personal injuries sustained by the fall of a defective fire escape used by him while in the employ of a contractor on defendant's building, it will not be presumed that defendant complied with the law relating to fire escapes, where there is no evidence of an inspection as required by Act of May 2, 1905, section 22, and there is proof that the accident would not have occurred if a proper inspection had been made.

Appeal by defendant from a judgment of the Court of Common Pleas of Huntingdon County, rendered in an action brought by Frank E. Newingham against the J. C. Blair Company, to recover damages for personal injuries alleged to have been sustained by the fall of a defective fire escape. Affirmed.

For appellant—W. S. Dalzell and Thomas F. Bailey.

For appellee—H. H. Waite and Jas. S. Woods.

STATEMENT OF FACTS: At the trial James Sleeman, being on the stand, was asked this question: Q. Had you seen Newingham frequently in the building during the time this work was going on? (Objection).

"Mr. Bailey: We propose to show by the witness that the plaintiff was in the building 'A' of the defendant a day or two before the accident, and subsequent to the Tuesday before the accident, for the purpose of showing that if there was any inhibition or restriction in his movements by an officer of the company, to wit, that he should not use the stairways or elevators in the building, that he did not obey those instructions and was inside of the building, and it comes to the question of his exercising due care in leaving a safe way of departure from the building and going on the fire escape where he was injured, and also for the purpose of affecting the credibility of the plaintiff, who testified that subsequent to the Tuesday, when he was told by Hershey that he should not use the stairways or elevators of the building, he was not in said building.

"Mr. Waite: That is objected to as utterly immaterial, irrelevant, and inadmissible as to how much the plaintiff was in the building on another day. The plaintiff did not testify that he had not been in the building on other days, so it does not contradict him. He simply states in his examination that he did not remember to have used the inside of building 'A' on the morning of the day on which he was hurt, but he did not testify that he had not been in building 'A' on other days; but, even if he had been, it would tend to contradict him only on an immaterial point.

"The Court: Objection sustained. Evidence rejected. Bill of exceptions sealed for defendant."

William Hassenfue being on the stand, this offer was made.

"Mr. Bailey: I propose to show by the witness on the stand that he passed over the fire escape at the point where the accident occurred a number of times before the accident occurred; that he had intended to speak to Mr. Woolheater of the J. C. Blair Company and to his own employees, but overlooked it, for the purpose of showing that that omission on the part of the witness is what produced the accident which forms the basis of this action, that it was his negligence which prevented the proper supporting of the fire escape and which was the proximate cause of the plaintiff's injury.

"Mr. Waite: That is objected to, because, if the evidence was even to go to the jury, it would only show contributory negligence on the part of the plaintiff's employer, which would not relieve the defendant from its negligence, if the jury believe it was negligence, and if the negligence contributed to this accident.

"The court: Objection sustained. Evidence rejected. Bill of exceptions sealed for defendant."

POTTER, J. In this action the plaintiff sought to recover damages for injuries which he sustained through the alleged negligence of the defendant company. He was a tinner and roofer, in the employ of a contractor who had engaged to copper flash the roofs of certain buildings for the defendant. There were three ways of gaining access to the roofs—by the elevator, by the inside stairway, and by the fire escape. The evidence tends to show that shortly after the work began the vice-president of the defendant company gave directions that the workmen should not go through the buildings, but should use the fire escape to reach the roof. On the morning of June 6, 1908, the plaintiff was on the roof, in the discharge of his duties, and had occasion to descend. While on the fire escape, one of the platforms gave way beneath him, and he fell, and was severely injured. The defendant company was charged with negligence in failing to maintain the fire escape in a safe condition, and in requiring plaintiff to use an unsafe way of passage. Upon the trial, a request for binding instructions in favor of defendant was refused, and the case was submitted to the jury, who returned a verdict in favor of the plaintiff for the sum of \$7,175. From the judgment entered thereon defendant has appealed.

In the first assignment of error counsel complain of the action of the court below in excluding defendant's offer to show that plaintiff was in one of the buildings of defendant a day or two before the accident, and after the direction had been given to use the fire escape in order to reach the roof. We see no error in the exclusion of this offer. Its purpose was evidently to show that plaintiff did not obey the orders which had been issued prohibiting the use of the elevator and the stairway. But the offer of proof, as made, fell short of that end. It was merely a proffer to show that plaintiff was in the building. If he was, it would not necessarily follow that he used the elevator or the stairway; and, even if he did do so, the relevancy of that fact to the issue being tried is not apparent.

The second assignment is to the overruling of an offer to show that plaintiff's employer had passed over the place, and had noticed, and intended to give warning of, the dangerous character of the fire escape at the point where the accident occurred. The offer was properly excluded, as immaterial. If there was any neglect of the kind indicated, on the part of the employer, its effect would not be to relieve the defendant of its own responsibility.

In the third and fourth assignments it is alleged that the trial judge in charging the jury inadvertently misquoted certain testi-

mony. Our examination of the printed records leads us to think that the court was substantially correct in the statements made. But, if in the opinion of counsel for defendant a mistake was made, it should have been brought to the attention of the court before the jury retired; otherwise, the matter is not properly assignable for error. *Kuntz v. N. Y., etc., R. Co.*, 206 Pa. 162, 55 Atl. 915; *Commonwealth v. Razmus*, 210 Pa. 609, 60 Atl. 264.

The assignments from the fifth to the eleventh, inclusive, complain of portions of the charge and of the answers to points relating to the extent of the injuries and to the measure of damages. In none of these do we see any substantial error. There was ample evidence as to the probable permanence of the injuries. Dr. Northrup testified that the probability of recovery was very unlikely; and, again, that it was doubtful. Dr. Hoffman testified that he considered plaintiff to be permanently injured, and did not believe that he would be able to do any laborious work. Dr. Chisholm said on cross-examination that the probabilities were that plaintiff would not ever fully recover from his injuries.

The refusal of defendant's ninth point is made the subject of the twelfth assignment of error. We do not find that this point accurately states the testimony of Mr. Koch. An examination of the record does not show that he said positively that he never instructed any of the employees of the contractor to use the fire escape, but only that he testified that, to the best of his recollection, he did not tell Mr. Hershey not to use the elevator, or that he must use the fire escape. There was some evidence tending to show that plaintiff used the elevator, and on one occasion used the stairway between two of the upper floors, after he had been notified not to do so. Plaintiff, however, denied this. But even if he did use the elevator or stairway at times, in disregard of orders, that fact would not affect his right to rely upon the fire escape being in a proper condition, when he was ordered to use it. His action would not have affected the fact, if the jury found it to be such, that defendant's manager had not only invited, but ordered, the employee of the contractor to use the fire escape. In the shape in which the ninth point was presented, it was properly refused.

In the thirteenth assignment of error complaint is made that the trial judge failed to give the jury certain instructions; but it does not appear that counsel for defendant made any request for any such instructions. This specification is not therefore to be sustained. *Kaufman v. Pittsburg, etc., R. Co.*, 210 Pa. 440, 60 Atl. 2.

In the fourteenth assignment it is suggested that the court below erred in the answer made to defendant's tenth point, which requested the trial judge to charge that if the jury believed that plaintiff jumped a distance of $3\frac{1}{2}$ feet from the top of the fire wall to the floor of the fire escape, and thus subjected it to an undue strain, he could not recover. While the trial judge refused the point as put, nevertheless he instructed the jury that it was for them to say "whether the plaintiff acted in the way an ordinarily prudent person under the same circumstances would have acted." We think this was a fair submission of the question involved to the consideration of the jury. More especially is this true in view of the fact that in affirming the very next point for charge offered by counsel for defendant the jury were instructed that, if they believed that the negligence of the plaintiff contributed in any way to his injury, there could be no recovery in this action.

In the fifteenth assignment of error it is alleged that the court, "having admitted the Carlisle Tables of Mortality, erred in not carefully guarding the effect of the evidence by directing the attention of the jury to the circumstances affecting the duration of the life in question." This specification is subject to the same criticism as that made upon the thirteenth assignment, in that it does not appear that counsel made any request upon the trial for any such instructions. It is undoubtedly true that, where mortality tables are admitted in evidence, the jury should be cautioned not to accept the results set forth in the tables as conclusive; and they should have been directed to take into consideration the circumstances affecting the duration of the life in question. It would have been better if the trial judge had given such instructions. But we do not regard the omission in this case as amounting to reversible error. The testimony showed that plaintiff was in excellent health prior to the accident, so that, if the matter of his expectancy of life had been referred to by the trial judge in his charge, the evidence as to the age and physical condition of the plaintiff would have justified the jury in adopting the most favorable view of the probabilities of the continuation of his life. Counsel made no request for instructions as to the weight to be given to the evidence obtained from the mortality tables, nor did they call the attention of the trial judge to his omission to charge upon that subject. We do not think the failure to so charge is sufficient to justify a reversal of the judgment.

In the sixteenth and seventeenth assignments of error complaint is made of the refusal by the trial judge of binding instructions in

favor of defendant, and of his refusal to enter judgment for defendant *non obstante veredicto*. These specifications raise broadly the question of the plaintiff's right to recover. In support of their contention that defendant owed no duty to plaintiff in the way of keeping the fire escape in safe condition, counsel for appellant cite the case of *Callan v. Pugh*, 54 App. Div. 545, 66 N. Y. Supp. 1118. But an examination of that decision shows that it was put upon the ground that the excavation which caused the fall of the arch was not made under the owner's direction, nor did it appear that he had notice of the dangerous condition of the arch. Apparently it had been weakened by excavations which were being made by an independent contractor. The distinction between such facts and those of the case now before us is obvious. They also cite *Maguire v. Magee*, decided by this court, but reported in 22 W. N. C. 159, 13 Atl. 551. There the injury resulted from a defective scaffold, of a temporary character, erected by a contractor for the use of his own employees alone. In the case of *Myers v. Electric Illuminating Co.*, 225 Pa. 387, 74 Atl. 223, the decision was based on the fact that the danger from un-insulated wires was an obvious one, of which the plaintiff was held to have assumed the risk. In the argument of the case at bar, counsel rely strongly upon *Hotchkin v. Erdrich*, 214 Pa. 460, 20 Am. Neg. Rep. 476, 63 Atl. 1035, 1036, 10 L. R. A. (N. S.) 506, where the plaintiff was injured by a fall caused by the giving way of a round of a ladder inside a chimney, which he was ascending in order to perform some work at the top. But in that case it was said [page 463 of 214 Pa., page 478 of 20 Am. Neg. Rep.]: "The testimony does not show any direction to the plaintiff by the defendant to use the inside ladder, but it does show permission, or possibly an invitation, to do so." In the present case there was not only an invitation by the defendant company to use the fire escape, but there was, according to the testimony of the plaintiff, an express direction to make use of that means of access to the roof, and a prohibition of the use for that purpose of the elevator or of the inside stairway. It was further pointed out in that case that the same degree of attention is not required in caring for a place seldom used, as is requisite in the maintenance of a passageway frequently called into use. In that case no occasion for inspecting the ladder fastened upon the inside of the chimney had arisen for some nine years. In the present case the defect was in a fire escape which from its very nature, and by reason of the purpose it was intended to serve should have been kept in a safe condition for use at all times.

To be sure the use which the defendant company directed should be made of it by the plaintiff was not the ordinary office of a fire escape, but it was apparently not an improper use, and, at any rate, it was placed at the disposal of the plaintiff and his fellow workmen by the express direction of the officer of the defendant company. In making use of the fire escape, as directed and required, the plaintiff had a right to rely on the presumption that the defendant had performed its duty in providing a reasonably safe means of access to the roof. The fire escape was under the circumstances to all intents and purposes, an outside stairway. If, instead of making use of it, the plaintiff had been instructed to take the inside stairway, and had been injured by the giving away of an improperly constructed platform, it would hardly be contended that the defendant would not be liable for the results. The fact that the fire escape temporarily transformed at the direction of the defendant into a stairway was located outside of the building, rather than inside, cannot change the principle involved. The decision in *Hotchkiss v. Erdrich*, *supra*, is put expressly upon the grounds, first, that there was no direction to the plaintiff to use the old ladder inside the chimney; second, that the crude iron rounds on the inside of the chimney wall did not constitute, under the circumstances, such an appliance as the defendant was required to inspect and keep in repair; third, that plaintiff did not in that case rely on any presumption that the crude ladder was in safe condition, but, instead, proceeded to test and inspect it himself as he ascended it, thus acknowledging and assuming the risk of its being defective. No one of these conditions, or anything similar thereto, is to be found in the case at bar.

In White's Supplement to Thompson on Negligence, § 979, what seems to be a sound general rule is thus expressed: "It is the rule that the owner of property owes to an independent contractor and his servants at work thereon the duty of exercising reasonable care to have the premises in a safe condition for the work, unless the defects responsible for the injury were known to the contractor. It is to be observed that the owner is not charged with the absolute duty of having the premises safe. His duty is discharged by the exercise of reasonable care." And in 21 Am. & Eng. Ency. of Law (2d Ed.) 471, it is said: "All the authorities agree that it is incumbent upon the owner of premises upon which persons come by invitation, express or implied, to maintain such premises in a reasonably safe condition for the contemplated uses thereof and the purposes for which the invitation was extended." The underlying principle of these

general statements has been recognized and enforced in our own cases. For example, in *Pottstown Iron Co. v. Fanning*, 114 Pa. 234, 6 Atl. 578, the plaintiff was a brakeman employed on a train of the Reading Railroad Company, which, while lawfully thereon, was wrecked by the collapse of a defective trestle owned and operated by the defendant. The latter was held liable for the damages resulting from the death of the plaintiff. And in *Pender v. Raggs et al.*, 178 Pa. 337, 35 Atl. 1135, the owners of a building which was undergoing alteration were held liable to an employee of the contractor who was making the alterations for injuries resulting from the fall of a wall, which (as found by the jury) became unsafe from the act of the owner.

It is suggested in the argument that because § 22 of the Act of May 2, 1906 (P. L. 352), provides for an inspection of fire escapes, it is to be presumed that defendant had complied with the law, and that the fire escape here in question had been duly inspected and approved. There is no evidence, however, of any such inspection. The record shows the positive testimony of David Hershey that the accident was due to defective construction of the fire escape which would have appeared had there been a proper examination or inspection. We are satisfied that, under all the evidence, this case was for the jury, and that in the manner of its submission there was no substantial error.

The assignments of error are therefore dismissed, and the judgment is affirmed.

IRONS v. GREENE.

[SUPREME COURT OF RHODE ISLAND, MAY 29, 1911.]

32 R. I. 383.

Master and Servant—Repair of Windmill—Personal Injuries—Contributory Negligence.

An experienced machinist sent aloft on a windy day to remedy a defect in the operation of a windmill, who failed to lash the mill tight enough to prevent the piston rod from working, is guilty of negligence contributing to his injury when, to prevent himself from falling, he placed his hand where it was crushed by a downward stroke of the piston.

Exceptions by defendant to rulings of the Superior Court of Providence and Bristol Counties made in an action brought by Ferner V. Irons against Nathanael R. Greene to recover damages sustained by plaintiff while in the employment of defendant, in which a verdict in favor of plaintiff was rendered. Exceptions sustained.

For plaintiff—T. P. Corcoran.

For defendant—Frederick C. Olney.

BLODGETT, J. At the conclusion of the trial of this action on the case for negligence, the defendant moved for the direction of a verdict which was denied, and to such denial the defendant duly excepted, and after verdict for the plaintiff the cause is brought here on defendant's exception to such denial.

The evidence disclosed that the plaintiff was a machinist by calling, and that he was employed by the defendant to attend to various matters connected with the defendant's hotel; among those specified in the defendant's letter, specifying his duties, being to "attend to the windmill, and see that the water supply is all right and the ice plant in order, and attend to the gas plant when necessary." The plaintiff was injured while repairing the windmill above referred to,

NOTE.

On the subject of Accident to Servants by Machinery, see note in 10 Am. Neg. Rep. 301.

And on the Duty of Master to Furnish Servant Safe Place to Work, see note in 12 Am. Neg. Rep. 251.

And on these subjects generally, see Vols. 13-16 Am. Neg. Cas., these volumes being devoted exclusively to "Master and Servant Cases" decided in the several States and Territories from the earliest period to 1896, and in which the numerous topics are classified under each subject.

which stood about 60 feet above the ground, and had been damaged in some way by a high wind, so that its action could not be controlled from the ground. The plaintiff was instructed to ascertain the cause of the trouble and to repair it. He ascended the post which supported the windmill, in which there were spikes driven at intervals on the sides thereof, until he reached the platform directly beneath the wheel, which extended like a floor on the framework of the mill, but having a V-shaped opening on one side to admit one to ascend and to descend therefrom in case of needed repair. The wheel was in motion by the wind then blowing and this is his testimony: "Q. 164. Then, at the time you went to Greene's Inn to inquire about this job, you knew that a part of your duties and the most they wanted was to take care of and attend to a windmill, didn't you? A. Yes. * * * Q. 174. You are a machinist by trade? A. Yes. Q. 175. And know something about machines, don't you? A. Yes. * * * Q. 176. And the workings of them? A. Yes. Q. 203. Now, when Mrs. Greene—you had some conversation with Mrs. Greene in the office just prior to your fixing the mill? A. Yes. Q. 204. And what was that? A. She told me that I ought to fix it right off, as it was liable to blow away. * * * Q. Now, you say that you took up the pliers and a hammer, a wire, and a rope? A. Yes. Q. What did you take a rope for? A. To tie the windmill. Q. To tie the windmill? A. Yes. Q. Who told you to take it? A. I took it myself. Q. Nobody told you to take it? A. Nobody. Q. Did you think it was necessary to lash that mill before you went to work on it? A. I had never gone up there; if it wasn't—Q. You knew it was necessary? A. Anybody would know it; if the wind changes the windmill will swing. Q. And you knew that if you didn't lash that mill that that piston rod would run up and down—would work? A. Yes. Q. And if you did lash it, it wouldn't work? A. Well, if the mill was shut off, it wouldn't. Q. If you lashed it tight enough, the piston rod wouldn't work, would it? A. No. * * * Q. When you tied it would it work any? The mill operating just the same? A. The wheel was working. Q. Do you mean to say that you tied that mill, and it still kept working? A. I tied the mill so that it wouldn't swing around. I didn't tie it so that it would stop working."

His claim is that, in attempting to descend through the V-shaped opening in order to procure additional tools, as he stooped to place his right foot on the first spike below the said opening, he leaned upon a piece of board about $4\frac{1}{2}$ inches wide, seven-eighths inches thick and situated three feet and six inches from the post to its outer

edge, and that as he felt it giving away at one end he threw one hand around the post supporting the wheel, between the pump rod or piston and the post, and that a joint or coupling on said rod in its downward stroke crushed his hand and caused the injury of which he complains. He did not fall from the platform, but descended in safety otherwise than as above described. It is evident that his injury was caused by the motion of the pump rod, as he himself claims, and that if said rod had been stationary he would not have been hurt.

A machinist, accustomed to the working of machines, though claiming he was not acquainted with windmills, sent aloft to a height of 60 feet to ascertain and remedy a defect in its operation and control, with a wind blowing and the whole mechanism in motion, and at two o'clock in the afternoon of a June day, and realizing the necessity of first lashing the wheel, as well as having the means at hand for securely lashing the same, must be held subject to the rule laid down in *Judge v. Narragansett Electric Lighting Co.*, 21 R. I. 128, 10 Am. Neg. Rep. 467, 42 Atl. 507, viz.: "In these circumstances he was bound to the exercise of a very high, if not the highest, degree of care, or, in other words, to a degree of care commensurate with the dangers to which he was exposed." His admission that he knew that the piston rod would run up and down if the mill was not properly lashed is evidence under the circumstances of this case of such contributory negligence in not fastening it as suffices in law to preclude his recovery.

The defendant's exception is sustained, and the plaintiff may show cause on June 5, 1911, at ten o'clock a. m. why judgment should not be entered for the defendant.

MEJEA v. WHITEHOUSE.

[SUPREME COURT OF HAWAII, JULY 6, 1908.]

19 Haw. 159.

1. Master and Servant—Safe Place to Work.

The obligation of an employer to provide a safe place to work, does not include places made dangerous by the progress of the work.

2. Master and Servant—Fellow Servant—Injury—Liability of Master.

At common law a servant who is injured by the carelessness or negligence of a fellow servant has no remedy against the common employer.

3. Master and Servant—Liability of Master—Injury by Fellow Servant.

A foreman who has charge of a gang of laborers engaged in excavating a perpendicular bank of earth, is a fellow servant of the laborers under him, and the master is not liable to a laborer who is injured by the fall of the bank when working in a dangerous place at the direction of the foreman.

4. Master and Servant—Contract of Insurance—Rights of Servant—Injury.

A contract between the government and one engaged in building a ditch requiring the latter to "provide such precautions as may be necessary for the prevention of accidents to life or property and shall assume all responsibility of all damages or costs resulting therefrom," does not constitute a contract of insurance for the benefit of a laborer who is injured by the negligence of a fellow servant.

Exceptions from the Circuit Court of the First District of Hawaii, raised by plaintiff, Cataline Mejea, in an action against L. M. Whitehouse for negligent injuries in which a judgment of non-suit was entered. Exceptions overruled.

For plaintiff—T. M. Harrison.

For defendant—C. F. Clemons (Thompson & Clemons, on the brief).

BALLOU, J. Defendant was a contractor engaged in building the Nuuanu dam under contract with the Territory. Plaintiff was a la-

NOTE

On the subject of Duty of Master to Furnish Safe Place to Work, see note in 12 Am. Neg. Rep. 251.

And on the subject of the Fellow Servant Doctrine, see notes in 1 Am. Neg. Rep. 309; 3 Am. Neg. Rep. 109;

6 Am. Neg. Rep. 297; 7 Am. Neg. Rep. 188; 8 Am. Neg. Rep. 193.

And see also numerous Notes on these subjects in Vols. 13-16 Am. Neg. Cas., those volumes dealing exclusively with "Master and Servant Cases" decided in the several States and Territories from the earliest period to 1896.

borer engaged in pick and shovel work and at the time of the injury which gave rise to this action, was working in a gang under James Howatt, who was assistant government engineer representing the Territory in the inspection of the work. It is not clear from the evidence how Howatt came to be temporarily in charge of the gang of workmen. In excavating a perpendicular bank of earth plaintiff was directed by the foreman to take the earth from the bottom of the bank and had been ordered to hurry up. While working in accordance with these directions the bank caved in and fell upon him rendering him unconscious for a time, breaking his thigh and causing other injuries. He brought this action for damages against the defendant and at the close of his case was non-suited.

The negligence of defendant alleged in the declaration is in not having removed or properly supported the overhanging bank. The obligation of the employer to provide a safe place to work in does not, however, include places made dangerous by the progress of the work. *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440. In the present case the bank was originally perpendicular and became dangerous through the method of removal adopted under direction of the foreman, and the plaintiff in this court relies chiefly upon the foreman's negligence in directing the work to be done in this particular manner.

Assuming that Howatt was for the time being the agent of the defendant, and that the risk assumed by the plaintiff was not so apparent as to preclude his recovery, the testimony still presents no ground for recovery against the defendant. The common law rule is well established that a servant injured by the carelessness or negligence of a fellow servant has no remedy against the common employer. *Farwell v. Boston & W. R. Co.*, 4 Met. (Mass.) 49, 15 Am. Neg. Cas. 407, 38 Am. Dec. 339. In the majority of American jurisdictions it is also well established that it makes no difference that the servant whose negligence causes the injury is a submanager or foreman of higher grade or greater authority than the plaintiff. *Holden v. Fitchburg R. Co.*, 129 Mass. 268, 16 Am. Neg. Cas. 433, 37 Am. Rep. 343. The contrary doctrine, known as the superior servant limitation, was first introduced in the case of *Little Miami R. Co. v. Stevens*, 20 Ohio, 416, and has been adopted in a number of States, but whatever may be its advantages in mitigating the strictness of the common law rule we cannot adopt it in face of the authoritative decisions of the United States Supreme Court by which, in the absence of Hawaiian judicial precedent, we are bound. In *Balt. & Ohio R. Co*

v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, and New England R. Co. v. Conroy, 175 U. S. 323, 7 Am. Neg. Rep. 182, 20 Sup. Ct. 85, 44 L. Ed. 181, the authorities are reviewed and the confusing case of Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, is finally overruled. Under the principle announced in the decisions of the Supreme Court the foreman of a gang, directing its work, does not stand in the position of a vice-principal for whose negligence the employer is responsible. Central R. Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994.

It is true that the defendant in his contract with the government agreed that he should "provide such precautions as may be necessary for the prevention of accidents to life or property and shall assume the responsibility of all damages or costs resulting therefrom." But we cannot construe this as a contract of insurance for the benefit of the employees but merely the assumption of responsibility as between the defendant and the Territory, inserted out of abundant caution, notwithstanding the non-liability of the Territory.

Whatever may be the hardship of the law which throws upon the laborer the risks of his employment and of the negligent acts of his fellow servants, the courts, in the absence of legislation, can afford no relief in cases like the present.

Exceptions overruled.

MEDLIN MILLING COMPANY v. BOUTWELL.

[SUPREME COURT OF TEXAS, FEBRUARY 8, 1911.]

— Tex. —, 133 S. W. 1042.

1. Master and Servant—Injuries by Sportive Act of Servants—Liability of Master—Scope of Employment.

A milling company which employs a large number of servants is not liable for injuries to a new employee inflicted by its officers and employees in a sportive attempt to place the new employee across a barrel for the purpose of paddling him, as an "initiation" into the service of the company, although the custom of initiating new officers and employees had existed for a number of years with the knowledge and acquiescence of the officers of the company, such act being wholly without the scope of the authority of either the officers or the employees.

2. Master and Servant—Injuries to Servant—Knowledge of Danger.

A master may be liable for negligently exposing his servant to a hidden danger, which is known to the former but of which the latter is ignorant, incurred by the latter in doing work in the course of his employment, although the dangerous situation arose from the conduct of strangers.

In error to the Court of Civil Appeals of Fifth Supreme Judicial District, to review a judgment rendered in favor of plaintiff (122 S. W. 442) in an action brought by E. M. Boutwell against the Medlin Milling Company to recover damages for injuries inflicted by the sportive acts of fellow servants. Reversed.

For plaintiff in error—J. T. Jones.

For defendant in error—J. P. Copeland, J. P. Yates, and H. L. Carpenter.

CASE NOTE.

Liability of Master for Injury by Sportive Act of Servant.

On the theory that a master is not liable for the unauthorized torts of a servant which do not fall within the scope of the latter's employment, it was held in *Galveston, H & S. A. R. Co. v. Currie*, 100 Tex. 136, 10 L. R. A. (N. S.) 367 (1906), that the master is not liable for injuries which resulted in the death of a servant caused by the act of a fellow servant, who used compressed air in his work in cleaning engines in the master's round-house, in turning a stream

of compressed air from a pipe against such servant in sport. The failure of the master to guard a dangerous agency which he had placed in the hands of his servant, was held not to affect the master's liability.

Liability on the part of the master was also denied in *International & G. N. R. Co. v. Cooper*, 88 Tex. 607 (1895), on the ground that the act of the engineer and fireman in causing the injury complained of, was not in furtherance of the business of the master and not in accomplishment of the object for which they were employed. In this case it appeared that the engineer and fireman who had

WILLIAMS, J. This writ of error is prosecuted from the judgment of the Court of Civil Appeals affirming that of the district court in favor of defendant in error (plaintiff) against plaintiff in error (defendant) for damages for a personal injury inflicted on the plaintiff, a new employee of the defendant, by its other employees while attempting, in sport, to lay him across a barrel for the purpose of paddling him, a process which they called the "initiation" into the service. The defendant is a milling corporation, and at the time in question and for years before had a president, general manager, foreman, and other employees and servants. The custom of "initiating" all new officers and employees from the president to the lowest, in the manner indicated, which had commenced several years before plaintiff's entrance into the service, seems to have been observed with reference to all with perfect impartiality; and it is, perhaps, needless to add that they all knew of it. About a week after plaintiff's employment, several of the employees, including one of the foremen, attempted to subject him to the process, and a struggle followed in which he received the injuries of which he complains.

charge of a freight train, permitted another, without authority, to ride in the cab of the engine; in playing a practical joke upon him they scalded him, thereby inflicting a serious bodily injury. In pointing out the difference between torts committed by employees outside the line of their duty and those committed when they were acting within the scope of their employment, the court said: "The distinction lies in this: That if the act done—that is, the discharge of the hot water—was one authorized to be done by the servants, and was at the time being done in the discharge of their duty as such servants, then the master would be responsible for the consequences to the plaintiff, although the servants might, in the discharge of their duty, maliciously or mischievously have thrown the water upon the plaintiff. It can not be said that the act of putting the water upon the plaintiff must have been authorized, because such act would never have been authorized by a master; but it is the act

itself of discharging the hot water that must have been done in the course of the employment of the servant, and for the purpose of forwarding the business of the master. It does not matter that the servant might have used the same appliances in the discharge of a duty to the master, but the question definitely and distinctly presented is, was the servant in the particular case in the discharge of such duty? And, as before said, if thus in the discharge of a duty, the manner of its performance, if wrongful, whether that be negligently done, maliciously, or in sport, does not affect the question of liability."

Where actors connected with a variety theater engaged in a frolic among themselves during the last night of their performance at the theater, consisting of throwing tin cans, old shoes and other missiles at each other as they were doing their respective turns on the stage, one of the actors who was injured by being struck by one of the missiles, cannot

These seem to us to be all of the facts to be taken into consideration in reaching a decision, and we can discover in them no basis for legal liability on the part of the defendant. The defendant was held responsible for the assault committed by persons in its service because the practice had been pursued with the knowledge and acquiescence of those who were its officers and managers, which fact was held to justify the finding that defendant had authorized the assault. But what, we may ask, as such officers and managers, had they to do with the custom? It was a practice of the men who happened to be officers, or employees, of the corporation in an affair of their own, and not in or about any business of that corporation. Officers as well as employees were engaged in it as individuals and not as representatives of the company. Their knowledge of and acquiescence in it was simply that of men concerning the conduct of persons pursuing exclusively their personal ends. About a matter of that kind they were wholly without authority to act for or bind their principal. It is in the assumption that the conduct of the officers with reference to such a matter is to be treated as that of the corporation the fallacy lies. Such a proposition is true only when the officer acts or fails to act in some business of the corporation, the conduct of which lies within the scope

recover from the owners of the theater for the injuries so sustained, since such conduct is not within the scope of their authority or that of the stage manager. "The acts complained of," said the court, "which occasioned the injury, if they in fact did so, were clearly without the scope of the authority of the fellow actors, including the stage manager. Manifestly the whole affair was a frolic among the performers themselves for their own amusement, edification and diversion. * * * For a considerable period while this side play was in progress, after plaintiff's appearance upon the stage, she still remained at her post and continued her act, with as full knowledge of the danger incident thereto as anybody else could possibly have had, when she might easily have withdrawn and avoided it all. By failing to do so, under such circumstances, she assumed the risk attend-

ant upon her remaining. She thus made possible the injury, and which could not otherwise have occurred, and thus contributed thereto by her own negligent conduct. * * * To bind the company for damages resulting from such conduct and actions on the part of its employees they must have been expressly or impliedly authorized, and if by implication, then in such manner as to leave the matter free of doubt. * * * There appears to be no doubt, upon a full consideration of all the testimony, that these stage people were all fellow servants. Any of the acts complained of, which the stage manager is charged with having committed, were not within the scope of his employment, but on the contrary, were entirely outside of it." *Novelty Theater Co. v. Whitcomb*, 47 Colo. 110 (1909).

An ice manufacturing company has been held not to be liable for injuries

of his authority and in which he is employed to represent it. That a corporation may expressly or impliedly authorize the commission of assaults and be made liable for those committed by its agents which it so authorizes is undoubtedly true; but it does not authorize its employees to commit assaults merely by employing and failing to restrain them. The assault, unless expressly authorized, must come within the scope of that which the servant is employed to do. Nor does it by the mere selection of officers empower them to make it responsible for their action or non-action in or about matters entirely outside the sphere of its business. In such affairs the officers and employees do not act or acquiesce as representatives, but as free agents responsible for their own conduct. We believe that the full law of this case is contained in the following passage from Labatt's Master & Servant, § 537: "Whatever difference of opinion there may be as to the character of the relations which must be shown to exist between the delinquent and the injured employees, in order to affect the master with liability, it is universally agreed that the general rules of the law of agency are controlling in all cases to this extent: That, on the one hand, if the act was within the scope of such employee's authority, the master cannot escape liability on the ground that it was done in direct violation of his orders, and that, on the other hand, there can be no recovery, where the act or order which caused the injury was entirely outside the scope of the authority of the delinquent employee. If the act or order had no reference to the master's concerns, there is, of course, no liability on the master's part. But, even if this point is determined in the plaintiff's favor, he must still fail, unless he can show that the superior servant had authority,

to certain rural youths, caused by the act of its employees in slamming a coal scoop on the iron stairs in the plant, shutting off steam which was usually regulated by an automatic air pump, the turning out of electric lights, and yelling with intent to cause fright, for the sole purpose of playing a practical joke upon the youths, although the things used in perpetrating such joke were the property of the master. The court said: "The appellee here (plaintiff) was engaged in no business with the appellant, buying no ice. No employee of appellant was engaged in transacting any business

of his master's with appellee. The acts done in the perpetration of this practical joke were wholly out of the line of their employment. * * * The inquiry is not whether the act in question in any case was done, so far as time is concerned, while the servant is engaged in the master's business nor as to mode or manner of doing it; whether in doing the act he uses the appliance of the master, or whether, from the nature of the act itself as actually done, it was an act done in the master's business or wholly disconnected therefrom by the servant, not as servant, but as an individual

either express or implied from the nature of his functions and the regular course of the business, to do the act or give the order alleged to be negligent. The ultimate and essential question is whether the vice principal had ostensible authority to give the orders which led to the injury. Hence, if a representative capacity is bestowed upon a superior servant by general directions to obey his orders, that capacity continues, so far as the subordinate receiving those directions is concerned, until he is actually informed that the authority so given has been withdrawn or restricted. But in cases of this class it is held that the mere belief of the injured servant that he had been directed to obey the orders of the delinquent will not be sufficient to fasten responsibility on the employer, if, as a matter of fact, no such directions had ever been given. In most kinds of business authority to commit acts of personal violence amounting to a battery cannot be inferred, for this reason, if for no other, that larger powers cannot be imputed to an agent than the principal himself possesses. A master, therefore, cannot ordinarily be held liable for the act of a supervising employee in beating a subordinate, even though it was for the purpose of furthering the master's business by compelling him to work."

An employer may become liable for negligently exposing a servant to a hidden danger, known to the master and unknown to the servant, which is to be incurred by the latter in doing the work which he is employed to do, although it arises from the conduct of strangers; but

on his own account. In the light of these principles it is clear that there was nothing to go to the jury, and the peremptory charge asked by the defendant should have been given." *Canton Cotton Warehouse Co. v. Pool*, 78 Miss. 147, 84 Am. St. Rep. 620 (1900).

But, in *Soderlund v. Chicago, M. & St. P. R. Co.*, 102 Minn. 240 (1907), it appeared that a crew of six or seven men who were engaged in repairing a railroad track, propelled a hand-car provided by the defendant for the use of the men in going to and from their work, at such a high rate of speed that the plaintiff lost his hold on the handle bars and fell from the car. There was no necessity for run-

ning the car so rapidly, and it was done thoughtlessly, in a spirit of fun, and for their own amusement, although the plaintiff had asked the men not to go so fast. In an action to recover damages for the injury so sustained, the court held that in negligently over-speeding the car the men were engaged in the performance of their duty to the master, and were acting within the scope of their employment, and therefore the master was liable. The court said that the employees were charged with negligently performing the very act which it was their duty to perform, that is, propel the car, and that in over-speeding it they negligently conducted the master's business. The fellow servant rule does not seem to

no such case is either alleged or proved. 1 Labatt, § 129, and cases cited. It is not the legal duty of the master to protect the servant from unlawful assaults, by strangers, and another servant committing such an assault not in the scope of his employment must be regarded as a stranger. Questions somewhat like those here involved are discussed in Lewis' Adm'r v. Taylor Coal Co., 112 Ky. 845, 66 S. W. 1045, 57 L. R. A. 447; Kelley v. Shelley R. Co., 15 Ky. Law Rep. 311, 22 S. W. 445.

No liability of the defendant having been shown, it is proper, in reversing the judgment, to render final judgment for defendant.

Reversed and rendered.

BROWN, C. J., disqualified and not sitting.

have been considered in this case. The distinction between this case and the preceding cases may, perhaps, be made on the theory that in such cases the act complained of was wholly unnecessary at the time of the injury, whereas, in this case, the particular manner

of performing the act, as well as the act itself, was made the basis of liability.

Cases involving mischievous acts of servants are not included within the scope of this note.

ALUMINUM COMPANY OF AMERICA v. RAMSEY.

[UNITED STATES SUPREME COURT, DECEMBER 11, 1911.]

222 U. S. 251.

Master and Servant—Statute—Validity—Negligence of Fellow Servant.

A State statute making railroad corporations, engaged in mining, liable for personal injuries to employees, due to the negligence of a fellow servant, does not deny the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

In error to the Supreme Court of the State of Arkansas, to review a judgment of that court (*Aluminum Co. v. Ramsey*, 89 Ark. 522, 117 S. W. 568) which involves the constitutionality, under the Fourteenth Amendment, of the Arkansas Fellow Servant Act. Affirmed.

For plaintiff in error—Uriah M. Rose, George B. Rose, Wilson E. Hemingway, and J. F. Loughborough.

For defendant in error—Henry M. Armistead, T. M. Mehaffy, and J. E. Williams.

MR. JUSTICE McKENNA. The defendant in error brought this action against the plaintiff in error in the Saline Circuit Court of the State of Arkansas to recover for personal injuries alleged to have been received by him while in the employment of the company, which maintained a railroad to its mines, on account of the negligence of a fellow servant.

The action was based upon a statute of the State called by the parties "The Fellow Servant Law." (Acts 1907, Act 69, p. 162.)

The statute makes railroad corporations operating within the State and every company, whether incorporated or not, engaged in the mining of coal, "liable to respond in damages for injuries or death sustained" by agents, employees or servants, "resulting from the careless omission of duty or negligence of such employer," or "any other agent, servant or employee of said employer," in the same manner as though the carelessness, omission of duty or negligence was that of the employer.

NOTE.

On the subject of the "Fellow Servant Rule" in the United States Supreme Court, see note in 7 Am. Neg. Rep. 182.

And on the subject of the "Fellow Servant Rule" generally, see Notes in 3 Am. Neg. Rep. 109; 6 Am. Neg. Rep. 223-229, 297, 397; 10 Am. Neg. Rep. 212-220.

The company assailed the constitutionality of the statute by the request for the following instruction, which was refused by the trial court: "You are instructed that the Act of the Legislature approved March 8th, 1907, known as the 'Fellow Servant Law,' in providing it shall apply to all corporations but shall not apply to individuals, persons or partnerships, except those engaged in the operation of a railroad or coal mine, denies to this defendant the equal protection of the law, and is in violation of the Fourteenth Amendment to the Constitution of the United States."

There was a verdict for the plaintiff, defendant in error here, upon which judgment was duly entered. It was sustained by the Supreme Court of Arkansas. 89 Ark. 522, 117 S. W. 568.

The Supreme Court sustained the action of the trial court in refusing the instruction, on the authority of *Ozan Lumber Co. v. Biddie*, which had been previously decided and which is reported in 87 Ark. 587, 113 S. W. 796. This action of the court is assigned as error, and is the Federal question relied on.

A motion is made to dismiss, and, alternately, to affirm, respectively, on the ground that there is no Federal question in the State court's construction of the statute, and that if there be such a question it is foreclosed by repeated decisions of this court. In support of the motion to dismiss it is contended that the State court decided that the Act assailed is an amendment to the charter of the corporation under the reserved right to amend, alter or repeal the charter, and of this the corporation cannot complain, the exertion of such right being a condition of its existence.

In *Ozan Lumber Co. v. Biddie*, *supra*, the court decided that "The Fellow Servant Law" was an amendment to the charters of the corporations, made under the right reserved in the Constitution of the State to repeal, alter or amend such charters. The Ozan Lumber Company, however, was a domestic corporation, and whether the principle of the decision would be applicable to foreign corporations, as plaintiff in error in the case at bar is, being a Pennsylvania corporation, depends on many considerations, and involves questions not local; so we pass to the consideration of the merits.

On the merits the case is in a very narrow compass and does not demand much discussion, though plaintiff in error earnestly presses the contention that the statute is discriminatory in that it applies Whether that exact distinction, that is, the distinction merely between corporations and partnerships and individuals, is competent for a Legislature to make, under its power of classifying objects, we

are not called upon to decide. The distinction made by the statute is broader. The distinction (among others) it makes is between railroads operating in the State and individuals, and such distinction has been maintained by this court as not offending the Constitution of the United States. *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 26 Sup. Ct. 159, 19 Am. Neg. Rep. 625, 50 L. Ed. 322. See also *Employers' Liability Cases*, (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 504, 28 Sup. Ct. 141, 52 L. Ed. 307, and *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. 106.

What grievance plaintiff in error might have if it were not operating a railroad we are not called upon to consider, because it is limited in its complaint to the effect of the statute on it and cannot appropriate the grievance that corporations engaged in mining, but not operating railroads, may have on account of the distinction made between them and individuals.

It is true that the Supreme Court of the State, following *Ozan Lumber Co. v. Biddie*, 87 Ark. 587, 113 S. W. 796, decided the law was a regulation of corporations, and applied it to the plaintiff in error because it was a corporation, not distinguishing it as one operating a railroad. It, however, may be so distinguished under the statute. That is, the statute constitutes a class of corporations operating railroads, and under the cases we have cited the classification is valid, there being equality within the class. In other words, not only the plaintiff in error, but all other corporations operating railroads are covered by the statute.

We think, therefore, that the statute of Arkansas is not repugnant to the Fourteenth Amendment, and the judgment is affirmed.

KEEVER v. CITY OF MANKATO.**FLANAGAN v. CITY OF MANKATO.**

[SUPREME COURT OF MINNESOTA, DECEMBER 23, 1910.]

113 Minn. 55.

1. Waters—Purity of Supply—Municipal Corporations—Negligence—Liability.

A complaint charged that defendant city negligently allowed the supply of its waterworks system to become polluted with poisonous substances, and large quantities of filth and sewage to escape into and saturate its water supply, by reason whereof plaintiffs' intestates contracted typhoid fever and died as a consequence. On demurrer it is *held*:

(1) The municipality was liable for its negligence in its private or corporate capacity, and was not exempt because it was carrying out a governmental function.

(2) Under section 4503, Rev. Laws 1905, an administrator of a person whose death was due to the wrongful act of a municipality may maintain an action against it for damages consequent thereon. *Maylone v. City of St. Paul*, 40 Minn. 406, 42 N. W. 48, and *Orth v. Village of Belgrade*, 87 Minn. 237, 12 Am. Neg. Rep. 294, 91 N. W. 843, *followed*.

[Headnote by the Court.]

Appeal by plaintiffs, Delia Kever, as administratrix, and Kate Flanagan, as administratrix, from a judgment of the District Court of Blue Earth County, sustaining demurrers to the complaints in actions brought against the City of Mankato to recover damages for death resulting from impurity of water supply. *Reversed*.

For appellants—Chris Carlson and Dunn and Carlson.

For respondent—John W. Schmitt, H. L. Schmitt, S. B. Wilson, and Loren Cray.

CASE NOTE.

Liability of Municipal Corporation or Water Company for Sickness or Death Caused by Impure Water Supply.

- I. OBLIGATION AS TO PURITY OF SUPPLY, 187-189.
- II. GUARANTY AS TO PURITY, 189.
- III. ANALYSIS, 189.
- IV. LIABILITY FOR SICKNESS OR DEATH, 189-193.
- V. CONTRIBUTORY NEGLIGENCE OF CONSUMER, 193.
- VI. CRIMINAL LIABILITY, 194.

I. Obligation as to Purity of Supply.

It is generally sufficient if a water company which is required to furnish pure water, supplies water that is ordinarily and reasonably pure and wholesome, although not chemically pure. *Wilkes Barre v. Spring Brook Water Supply Co.*, 4 Lack. Legal News (Pa.) 367 (1882); *Com. v. Towanda Waterworks*, 1 Monaghan (Pa.) 500 (1888); *Brymer v. Butler Water Co.*, 172 Pa. 489 (1896); *Peffer v. Penn. water Co.*, 221 Pa. 578 (1908). Ordinarily pure and wholesome water means such

JAGGARD, J. This is an action for death by wrongful act, occasioned by the negligence of the defendant city. The complaint alleged that defendant, a municipal corporation, negligently allowed waters and the water supply in its waterworks system to become infected and polluted with poisonous substances "and large quantities of filth and sewage, all of which were saturated with the germs of diseases, * * * and did carelessly, negligently and recklessly * * * permit * * * foul, filthy, and dangerous substances, common sewage, and other filth to escape into and saturate the water supply;" that by reason thereof the water became imminently dangerous to life and health, of which defendant had full notice and knowledge; that plaintiff's intestate, a citizen and resident, used the water, contracted typhoid fever, and died in consequence. The complaint set forth additional facts as [to] the right of the administrator to recover. Defendant's demurrer to plaintiff's complaint was sustained. From that order the plaintiff appeals. It is to be noted that the complaint in the case

as is reasonably free from dirt, discolorment and odor, and reasonably free from bacteria, coli or other infection of contamination which renders it unfit for domestic use and dangerous to individuals. *Peffer v. Penn. Water Co., supra.*

And a water company which is required to obtain its supply from a certain river and to furnish water of good quality, does not violate its obligation by supplying water which is at times discolored when the river is high and turbulent, or because the water is hard, providing the company has done all it reasonably can do to furnish water of good quality. *Grand Junction Water Co. v. City of Grand Junction, 14 Colo. App. 424, 60 Pac. 196 (1900).*

So, a supply of water which is recognized as pure, free from injurious substances and reasonably clear, is regarded as a compliance by a water company with its charter requirements to furnish pure water. The water company must, however, filter the water when the supply is muddy, if it can be done by reasonable expense. *Brace Bros. v. Penn. Water Co., 7 Pa. Dist. R. 71 (1897).*

A water company to which a city conveyed the source of supply with a distinct understanding that the water furnished from such source should be used for fire protection and domestic use, cannot be compelled to install a filter plant when the water becomes impure, not from the negligence of the water company, but because of bacteria in the source of supply. *City of Georgetown v. Georgetown Water, Gas, Electric & Power Co., 134 Ky. 608 (1909).*

After a water company has secured a proper source of supply for domestic use, it is bound to exercise diligence in its effort to preserve the water from pollution and to deliver it to the public in no worse condition than that in which it is taken from the source of supply. The company is not, however, bound to provide water that is chemically pure, but only such as is ordinarily and reasonably pure. *Brymer v. Butler Water Co., 172 Pa. St. 489 (1896).*

The stipulation in the contract with a water company that the supply furnished a city shall be free from pollution, does not require that a river,

at bar sets forth not a mere action against the defendant to recover damages because the city failed to provide an adequate supply of pure water. The question here is whether the city is liable for, among other things, recklessly causing dangerous substances, like common sewage and other filth, to saturate its water supply and the wells, mains, and appurtenances thereto.

The first essential question is whether the city is exempt because it was carrying out a governmental function, or whether it is liable because it operated the waterworks in its private or corporate function. The defendant naturally insists that it was performing merely a governmental function. There is ambiguity in that term as used in this connection. It may mean that the operation of waterworks by a municipality is *intra vires* as distinguished from *ultra vires*, or it may mean that such function is public as distinguished from private or proprietary, in which capacity the city may voluntarily assume for business purposes and for its own advantage to conduct certain operations, and is held responsible for negligence therein,

which is a part of the supply, shall be free from pollution from its source to the point where it flows into the reservoir, but that the supply, by the time it reaches the city, shall be free from pollution. *Jersey City v. Flynn*, 74 N. J. Eq. 104 (1908).

II. Guaranty as to Purity.

A city is not an insurer of the quality of the water it supplies the inhabitants and is not bound under all circumstances to keep it pure and wholesome. *Danaher v. City of Brooklyn*, 119 N. Y. 241, 7 L. R. A. 592 (1890). Nor is a water company an insurer of the supply. As the court said in *Green v. Ashland Water Co.*, 101 Wis. 258, 5 Am. Neg. Rep. 265, 43 L. R. A. 117 (1898), a waterworks company operating under a franchise from and contract with a municipal corporation in distributing water for public and domestic use, is not liable as a guarantor of the quality of the water.

III. Analysis.

A city is not bound to make a chemical analysis of the water of free pub-

lic wells for the purpose of determining whether or not it is pure and wholesome, in absence of any notice that the water is not unwholesome, especially where it furnishes a public supply of running water in addition to such wells. *Danaher v. City of Brooklyn*, 119 N. Y. 241, 7 L. R. A. 592 (1890).

IV. Liability for Sickness or Death.

A company organized to supply a village with water cannot be held liable for failure to know that a case of typhoid fever existed on premises over which it had no control, located not far from a mountain stream which flowed into the same stream from which the water supply was obtained, about a mile and a half below the point where the water was diverted for municipal purposes, and to know that the water thus supplied to the inhabitants of the village might be infected by typhoid germs. *Buckingham v. Plymouth Water Co.*, 142 Pa. 221 (1891). In this case it appeared that a portion of the dejecta of the patient was thrown out of the back door of the house onto the frozen ground and

although the work is done ultimately for the benefit of its citizens. Many of the authorities to which defendant refers us properly hold that a city may properly operate waterworks. They have no tendency whatever to determine whether or not the city is or is not exempt in its operation of waterworks.

Defendant also insists that the city can make no profit out of its operation of these waterworks. Doubtless this is in a general way true. At all events it may be here admitted. But the sequence which defendant seeks to draw does not at all follow; i e., that therefore it should be exempted from all liability for mismanagement. For the city is liable for neglect in connection with its streets, sidewalks, and sewers, from which, in their very nature, no profit is or can be made. The city operates the waterworks for profit, in the sense that it is voluntarily engaged in the same business which, when conducted by private persons, is operated for profit. The city itself makes a reasonable and varying charge. The undertaking is partly commercial. It is enough that the city is in a profit-making business. "The city is exercising a special privilege for its own benefit and advantage, although a portion of the water is used by the city for

during a thaw was carried into the stream in question, causing the water to be polluted and producing an epidemic of typhoid fever among the consumers. There was evidence to show that the superintendent of the water company from time to time visited the banks of the stream for the purpose of examining its condition, and that he had made such examination a few days before the epidemic broke out, but found nothing to suggest danger of contamination.

A municipal water supply company, required by statute to keep in the pipes laid down by it a supply of pure and wholesome water, is not thereby rendered liable for lead poisoning caused by the water being contaminated by the lead service pipes laid down by it, and connecting the water mains with the premises occupied by the person affected, where the company permitted the one who occupied the premises to indicate the kind of service pipes to be used, and he selected lead pipes. *Milnes v. Huddersfield*,

L. R. 12 Q. B. Div. 443 (1883), affirmed by L. R., 11 App. Cas. 511.

A city cannot be held liable for the death of a child from fever contracted by drinking contaminated water from a well, on the ground that the city had discharged sewage into a stream above the well, and that the water in the well had become contaminated by percolation, since there are no such connecting links as to make a chain of causes by which the discharge of the sewage can be said to be the proximate cause of the death of the child by fever. *Wharton v. Bradford*, 209 Pa. 319, 17 Am. Neg. Rep. 125 (1904).

A city which has furnished a sufficient supply of pure water from other sources, is not liable for injuries caused by the drinking of water from free public wells, where neither failure on its part to keep the wells properly cleaned nor notice to it that the water supply had become impure is shown, and there are no circumstances to

protection against fire and in promoting the public health." Hamersley, J., in *Hourigan v. City of Norwich*, 77 Conn. 358, 17 Am. Neg. Rep. 445, 59 Atl. 487. The English authorities regard cities in such matters as "substitutions on a large scale for individual enterprises." Mr. Justice Blackburn, in *Mersey Dock Trustees v. Gibbs*, L. R. 1 Eng. & Ir. App. Cases at page 107, approving Mr. Justice Mellor in *Coy v. Wise*, 5 B. & S. 440.

Finally defendant insists that it would not be sound policy to open the door and permit actions like the present to be maintained, for the reason that as a result the defendant city, as well as any other city, would be liable at any time to have the same misfortune, and would be bankrupted thereby. The assessed valuation of the city is less than \$4,000,000. If the city is not exempted from liability, it is subject to claims of the same nature as the present amounting to over \$10,000,000. Thus the very existence of the city is threatened, and the city subjected to total destruction, which could be of no proportionate advantage to the individuals who suffered. It readily suggests itself as an answer to this dark prognostication that the number and nature of these cases does not appear in the record, and is not known to the court; besides for the purposes of this case, the neglect of defendant is necessarily assumed. To the defendant, under the law, a number of defenses are available. How conclusive they may be in fact is wholly beyond any conjecture which we can recognize. Accordingly we must regard defendant's figures as purely hypothetical. The question is one of general principles recognized by the law, and not of the private views of court or counsel as to

cause suspicion as to the purity of the water. In speaking of the duty of the city the court said: "It was undoubtedly the duty of the city to keep the wells and pumps in good order, and to keep the wells properly cleaned out so that they would not become contaminated by anything that might be thrown into them. But these wells were to be supplied by water percolating through the earth; and was the city bound to anticipate that such water would become impure and dangerous in the wells? There was no proof that the necessary or even the natural consequence that water in city wells, wherever they may be located,

will become poisonous and deleterious. On the contrary, the proof shows that the water of such wells have been used for years with impunity. These wells were furnished for the accommodation of the public. They were not obliged to use them, and most people have sufficient knowledge to know that their waters may not be as pure as waters brought from pure streams far away from the city limits and from exposure to contamination. The public may use them, and when they are found unwholesome or deleterious, and the city has notice thereof, it is bound to protect the public health by purifying the wells and pumps or filling up

what the convenience or necessity of a particular city may dictate under particular circumstances. The general experience of public and private waterworks is that ordinarily their operation involves no such financial disaster as defendant portrays.

It is obvious that a sound public policy holds a city to a high degree of faithfulness in providing an adequate supply of pure water. Nor does it appear why the citizens should be deprived of the stimulating effects of the fear of liability on the energy and care of its officials; nor why a city should be exempt from liability while a private corporation under the same circumstances should be held responsible for its conduct and made to contribute to the innocent persons it may have damaged. As Elliott, J., said in *City of East Grand Forks v. Luck*, 97 Minn. 373, 107 N. W. 393, 6 L. R. A. (N. S.) 198: "When the municipality enters the field of ordinary private business, it does not exercise governmental powers. Its purpose is, not to govern the inhabitants, but to make for them and itself private benefit. As far as the nature of the powers exercised is concerned, it is immaterial whether the city owns the plant and sells the water, or contracts with a private corporation to supply the water. It is not in either case exercising a municipal function. * * * When a municipality engages in a private enterprise for profit, it should have the same rights and be subject to the same liabilities as private corporations or individuals." And see *Powell v. City of Duluth*, 91 Minn. 53, 97 N. W. 450; *Gordon & Ferguson v. Doran*, 100 Minn. 343, 111 N. W. 272, 8 L. R. A. (N. S.) 1049; *State ex rel. v. Bd. Water & Light*, 105 Minn. 472, 117 N. W. 827, 127 Am. St. Rep. 581. Thus in *Wiltse v. City of Red Wing*, 99 Minn. 255, 109 N. W. 114, a city operating the

the wells. The burden upon the city is sufficient if it be held to the responsibility of keeping the wells and pumps in order and clean, and if it be made liable for any injury resulting from the use of impure waters from the wells after it has had notice of their dangerous qualities, and an opportunity to remove the danger. The higher degree of diligence as to water apparently pure and wholesome, agreeable to the taste and in common use by the public without complaint, would be unreasonable." *Danaher v. City of Brooklyn*, 119 N. Y. 241, 7 L. R. A. 592 (1890).

A water company cannot be held liable for injuries to the health of consumers from its failure to exercise ordinary care to procure a pure water supply from the source designated by its contract with the municipal corporation, where it does not appear that pure water could be obtained from such source. *Green v. Ashland Water Co.*, 101 Wis. 258, 5 Am. Neg. Rep. 265, 43 L. R. A. 117 (1898).

But a water company which furnishes water which it knows, or ought to know, is dangerous to life or health, may be held liable in damages to one who contracted typhoid fever in con-

waterworks was held liable for water escaping from an embankment under the rule in *Rylands v. Fletcher* [L. R., 3 H. L. 330, 6 Am. Neg. Rep. 678n, aff'g s. c., *Fletcher v. Rylands*, 1 Exch. 265]; "for," said Start, C. J., "although a municipal corporation, it was engaged in the business of supplying water to its inhabitants for profit, an undertaking of a private nature."

This is undoubtedly the general rule. See *Piper v. Madison*, 140 Wis. 311, 122 N. W. 730, 25 L. R. A. (N. S.) 239, 133 Am. St. Rep. 1078; *Park Comm. v. Common Council*, 28 Mich. 229, 15 Am. Rep. 202; *Bailey v. Mayor*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669. As to the reasoning of this case, however, see *Darlington v. Mayor*, 31 N. Y. 164-198, 88 Am. Dec. 248; Cf. *Missano v. Mayor*, 160 N. Y. 123, 6 Am. Neg. Rep. 652, 54 N. E. 744; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; *Ill. Trust & Sav. Bank v. City of Arkansas City*, 76 Fed. 271, 282, 22 C. C. A. 171, 34 L. R. A. 518; *City of Winona v. Botzet*, 169 Fed. 321, 94 C. C. A. 563, 21 Am. Neg. Rep. 445, 23 L. R. A. (N. S.) 204; *Judson v. Winsted*, 80 Conn. 384, 68 Atl. 999, 15 L. R. A. (N. S.) 91; *Wagner v. City of Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 522; *Esberg-Gunst Cigar Co. v. City of Portland*, 34 Or. 282, 5 Am. Neg. Rep. 292, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651; *Brown v. Salt Lake City*, 33 Utah, 222, 93 Pac. 570, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828; *Hourigan v. City of Norwich*, 77 Conn. 358, 59 Atl. 487, 17 Am. Neg. Rep. 445; *Lynch v. City of Springfield*, 174 Mass. 430, 6 Am. Neg. Rep. 573, 54 N. E. 871; *City of Chicago v. Selz, Schwab & Co.*, 202 Ill. 545, 67 N. E. 386, 14 Am. Neg. Rep. 23; *City of Philadelphia v. Gilmartin*, 71 Pa. 141; *Springfield Fire & Marine Ins. Co. v. Village of Keeseville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51

sequence of its contamination. Thus, in *Green v. Ashland Water Co.*, *supra*, it was held that a distributor of water under a public franchise, was liable to one who contracted typhoid fever as a result of the contamination by sewage of the water furnished by the company, where, from the situation of the sewage, the company should have known that the water it was distributing for domestic use was charged with typhoid germs.

V. Contributory Negligence of Consumer.

A consumer may be guilty of con-

tributory negligence in using water with knowledge of its impurity so as to preclude a recovery for injuries to health caused thereby. Thus, if the source of supply be contaminated with sewage for a long space of time, causing epidemics of typhoid fever annually in the community for a number of years and the occurrence of the epidemics is common knowledge, it is presumed that members of the community of ordinary intelligence have notice of the condition of the water, and those who use it take upon themselves the risk of sickness caused by such contamination. *Green v. Ash-*

Am. St. Rep. 667; *Asher v. Hutchinson, etc., Co.*, 66 Kan. 496, 71 Pac 813, 61 L. R. A. 58.

The cases in which a city has been held responsible or irresponsible for damages by fire consequent upon an adequate supply of water are in a class of cases by themselves. From many points of view the rule holding the city liable for its negligence is not consistent with the rule there announced. The law does not undertake to achieve the impossible. As was said in *Gould v. Winona Gas Co.*, 100 Minn. 258, at page 264, 111 N. W. 254, at page 256, 10 L. R. A. (N. S.) 889: "It is evident that the ultimate justification of the inapplicability of the rule (there in question) lies in the controlling regard of the common law, not for doctrine, but for common sense. Its paramount object is to work out substantial and not physical, justice. Its just claim to distinction is to be found, not in the logical consistency of its applied theories, but in the practical wisdom with which it has adapted its rules to varying subject-matter and conditions."

Defendant also urges that in no case has the city been held liable for negligence in the operation of its waterworks, unless the act involved a trespass, or an invasion of a direct property right. Thus water escaping from a city reservoir runs onto another's property and does damage; this is trespass, and there is liability. *Willse v. City of Red Wing*, 99 Minn. 255, 109 N. W. 114. But if the escaping water should do damage to a person and a public highway, there would be no trespass, but the law would recognize liability. Liability of the city is recognized in the case of streets and sidewalks, which cannot properly involve trespass. Nor has defendant shown any reason for imposing liability, in the case of trespass or breach of insurance of safety which does not logically apply to cases of negligence. On general principles, liability for negligence is more just

land Water Co., 101 Wis. 258, 5 Am. Neg. Rep. 265, 77 N. W. 722, 43 L. R. A. 117 (1898).

VI. Criminal Liability.

An indictment will not lie against one for supplying and selling unwholesome and poisonous water to an entire community, in absence of knowledge on his part of its poisonous quality. "The theory of the law is," said the court "that a criminal intent is a necessary ingredient of every indict-

able offense. The maxim is *actus non facit reum, nisi mens sit rea*. It is not necessary, in all cases, either to aver or prove the guilty intent; and the influence of legal presumption may, sometimes, be such, that the legal imputation of a guilty intent may be made in contravention of the fact; as for instance, the presumption that every one knows the law. Where the gist of the offense is negligence, or carelessness, it would, as a general rule be a solecism to speak of a guilty

and more generally recognized, because it is based upon culpability.

The question then arises whether, upon the assumption that plaintiff's intestate could have maintained an action against the defendant city, had he lived, can his executor maintain an action under our statutes. Section 4503, Rev. Laws, 1905, provides: "When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor, if he might have maintained an action had he lived, for an injury caused by the same act or omission." Defendant has pressed upon us very earnestly that "corporation," as here used, refers only to private corporations (see § 2839, Rev. Laws 1905), and does not include municipal corporations. The matter is not *de novo* in this State. In *Maylone v. City of St. Paul*, 40 Minn. 406, 42 N. W. 88, and in *Orth v. Village of Belgrade*, 87 Minn. 237, 91 N. W. 843, 12 Am. Neg. Rep. 294, the administrators of deceased persons were allowed to pursue the statutory action against the city for negligence causing death. Such has been the settled construction in practice for many years. We do not feel at liberty to change that construction.

Reversed.

ON MOTION FOR REARGUMENT, FEBRUARY 3, 1911. [113 Minn. 64.]

JAGGARD, J. In its motion for reargument defendant contends, in the first place, that the question of the construction of section 4503, Rev. Laws 1905, securing the cause of action in case of death by wrongful act—that is, the question whether the defendant, a municipal corporation, was a corporation within the meaning of that statute—is *de novo* in this State, notwithstanding the fact that in *Maylone*

knowledge, since the negligence of itself is usually evidence of a guilty mind; and the principle has been carried, in some cases, to the extent of making one criminally responsible for not using proper precaution to prevent injurious acts to his servants. * * * But this principle does not apply here, because the charge against the defendant is really an act committed, and not the omission of negligent performance of an act. Neglecting to supply good and wholesome water, and supplying unwholesome and poisonous

water, cannot be tortured into a simple charge of neglect. As well might it be said, that he who administers poison dissolved in water, is simply guilty of neglecting to administer pure water. * * * The poisonous quality of the water certainly may have been the result of some negligence, or carelessness, in the choice or arrangement of the instruments employed in supplying it; but such is not the charge, and we cannot aid the indictment by an inference of it." *Stein v. State*, 37 Ala. 123 (1861).

v. City of St. Paul, 40 Minn. 406, 42 N. W. 88, and in *Orth v. Village of Belgrade*, 87 Minn. 237, 12 Am. Neg. Rep. 294, 91 N. W. 843, this court determined that recovery on such a cause of action could be had in this State against a municipality under that statute, and sustained such recovery. It is only by ignoring these two decisions that defendant's argument is tenable. There is neither reason nor authority for so doing. It is entirely obvious that the self-contradictory proposition which defendant emphasizes gains no force by its own iteration. No reason accordingly is thereby suggested for changing the original opinion on this point.

Defendant urges, in the second place, that the court erred in assuming that the question of the nonliability of the city on the ground of public policy was not before the court. In point of fact, the court neither so assumed nor so determined. What it said on this point was this: "The question is one of general principles recognized by the law, and not of the private views of court or counsel as to what the convenience or necessity of a particular city may dictate under particular circumstances." The court did determine that the conjectural hardship of the operation of the rule of liability of a municipal corporation in this particular case was not an exclusive nor controlling consideration. The decision rested in effect upon this supreme consideration, namely, that public policy requires the conservation of human life, the preservation of public health, and the establishment of public sanitation on a firm and certain basis in the law. No reason whatever for changing our opinion as to the soundness of this view of public policy has been suggested.

Defendant urges, in the third place: "The court overlooked what it has repeatedly held, that the cases holding cities in this State responsible for injuries caused by defective streets, in the absence of a statute making cities responsible for such injuries, are 'illogical exceptions' to the general rule, and should therefore not be considered as authority in favor of liability in the case at bar." In point of fact this is not in accordance with the actual record. The court did not overlook this familiar and elementary point. On the contrary, it expressly adverted to the lack of philosophical and metaphysical consistency in the authorities on the question of the immunity or liability of municipal corporations in tort. The court in its opinion did not, however, undertake the equally venturesome and improper feat of ignoring the thousands of decisions on the point whose authority is unquestioned and unquestionable. Defendant contends in this connection, without apparent consciousness of the humor of the situation, that the original conclusion of the liability of the city for its tort was er-

roneous, because it was held in *Nerlien v. Village of Broton*, 94 Minn. 361, 102 N. W. 867, that a city could be restrained from using a public building as a place for selling flour. It is perfectly obvious that that decision furnishes no reason, apparent or otherwise, direct or indirect, for holding the city either immune or responsible in this case.

Finally, defendant demonstrates the unsoundness of its position by this argument, namely, that this conclusion in chief "invades the province of the Legislature. The Legislature alone can give a city the right to furnish itself and its citizens water from a municipal water-works, and it is for the Legislature and not for the court to say under what conditions cities may do so. The general rule is that cities are immune from liability resulting from torts." When this controversy was presented to this court, it was the duty of the court to determine it by reference to both precedents and principle. The result was not judicial legislation, but a judicial declaration of what the law was. That declaration made no change in the law; *au contraire*, it would have been judicial legislation if the court had changed the law, and decided this case in accordance with defendant's contention. The many authorities referred to in the opinion in chief, and many others, declare the law to be as this court found it to be. See, for example, 1 Dillon, *Municipal Corporations* (3d Ed.) §§ 66, 67; 3 Thompson on Negligence, § 5829; 2 Smith, *Municipal Corporations*, § 802; 3 Abbott, *Municipal Corporations*, § 892; Tiedeman on *Municipal Corporations*, § 327b; 1 Jaggard on Torts, p. 179; 28 Cyc. § 1289. Compare *Ottersbach v. Philadelphia*, 161 Pa. 111, 28 Atl. 991; *Todd v. Crete*, 79 Neb. 671, 113 N. W. 172; *Davoust v. Alameda*, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536.

The fallacy of inferring that this defendant was not liable from a general rule of immunity is obvious. That general rule is merely this: That sometimes cities are immune, and sometimes they are not. Defendant does not insist that the rule of immunity is universal or invariable; on the contrary, defendant distinctly recognizes exceptions to that rule. Whether this case fell within the rule or the exception was the very point we were called upon to decide. Defendant's argument would have had much more weight if he had referred the court to a single case in which under like circumstances the rule of immunity had been applied. This defendant has failed to do, as we believe for the perfectly good and natural reason that there is no such authority. Certainly *Hughes v. Auburn*, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 637, to which defendant now calls our attention, is not an authority to the contrary. This case did not involve liability in the con-

duct of waterworks at all. The cases concerning the inadequacy of water supply for fire departments, it is perfectly obvious, involve essentially different circumstances from those presented by the case at bar.

The motion for reargument must therefore be denied.

MITCHELL v. VILLAGE OF CHISHOLM.

[SUPREME COURT OF MINNESOTA, DECEMBER 29, 1911.]

116 Minn. 323.

Municipal Corporations—Blasting—Injury—Negligence.

The plaintiff, while lawfully on private property, was injured by being struck by a piece of rock hurled by the blasting, in a negligent manner, of rocks and boulders by the defendant in one of its streets. He brought this action to recover damages for his injuries, but did not give the notice provided for by § 768, R. L. 1905. *Held*, that the action is within the statute, and that the complaint does not state a cause of action.

[Headnote by the Court.]

Appeal by defendant from an order of the District Court of St. Louis County, overruling a demurrer to the complaint in an action brought by Henry Mitchell against the Village of Chisholm to recover damages for personal injuries caused by being struck by a rock hurled by a blast. *Reversed*.

For appellant—Woods & Knapp, and Bert Fesler.

For respondent—John Jenswold, Jr.

COMPLAINT.

For cause of action against defendant plaintiff says:

That the defendant is now and for a long period prior to the time hereinafter referred to was a municipal corporation within the County of St. Louis and the state of Minnesota and as such was duly organized and incorporated pursuant to law.

That on June 18th, 1909, and continuously for several days immediately prior thereto defendant, for the purpose of constructing and opening a public street laid out within its limits, pursued a method and plan whereby by means of high explosives it blasted large rocks and boulders therein and did thereby cause said rocks and boulders so blasted to be hurled to great distances amidst a large number of dwelling houses along said street, as well as others near thereto and including the occupants and inhabitants thereof and other people in that vicinity.

NOTE.

On the subject of Injuries or Damages Caused by Blasting, see notes in

7 Am. Neg. Rep. 484, 10 Am. Neg. Rep. 87, 11 Am. Neg. Rep. 170, and 17 Am. Neg. Rep. 29.

That said blasting was done without the adoption of any means or methods for covering said rocks to be blasted or guarding against the pieces thereof being hurled as aforesaid, and without any prior warning or notice given so that persons could protect themselves or escape threatened injury, and it did thereby wrongfully and unlawfully expose a large number of persons to serious and imminent danger to their lives and persons and property, which method was and continued to be a public nuisance and source of great danger.

That in the forenoon on June 18th, 1909, while plaintiff was lawfully standing on private property within the corporate limits of the defendant, defendant did wrongfully, wilfully and unlawfully cause said blasting and the said nuisance to be continued on one of its said streets to-wit: First Avenue, and did thereby expose a large number of persons and their property to danger, and did thereby and without giving any warning or notice thereof continue said nuisance, in which acts a fragment of one of said rocks so blasted was hurled with such force and at such distance as to strike the plaintiff and cause him serious and permanent injury in different parts of his person, and his left arm and shoulder and three ribs were so bruised and fractured that he has ever since been disabled from doing any work or earning any money but has continued to suffer severe physical and mental pain, and he is and will be permanently incapacitated from doing work, earning money and enjoying life, whereby he has sustained actual damages to the amount of \$15,000.

That plaintiff has demanded payment thereof, but defendant has failed and refused to make him any compensation therefor.

That plaintiff's said injuries were caused directly and proximately by and through the wrongful and unlawful acts of the defendant as herein stated.

Wherefore, plaintiff demands judgment against the defendant for the sum of \$15,000 together with his costs and disbursements herein.

START, C. J. This is an appeal in a personal injury action from an order of the district court of the county of St. Louis overruling a general demurrer to the complaint. So far as here material, the allegations of the complaint are to the effect following: On June 18, 1909, the defendant was engaged in blasting rocks and boulders in a public street of the village, without taking any precaution to guard against pieces thereof being hurled beyond the limits of the street, thereby exposing numerous persons to imminent danger and constituting a public nuisance; and on the day named the plaintiff, while lawfully standing on private property within the corporate limits, was,

without warning or notice, struck and injured by a part of a rock hurled by a blast with such force and at such distance as to hit him.

The complaint failed to allege notice to the village of the time, place, and circumstances of his injuries, as provided by § 768, R. L. 1905. The provision is as follows: "Every person who claims damages from any city, village, or borough, for loss or injury sustained by reason of any defect in a street, road, bridge, or other public place or by reason of the negligence of its officers, agents, or servants, shall cause to be presented to its council or other governing body, within thirty days after the alleged loss or injury, a written notice. * * * No action therefor shall be maintained unless such notice has been given, or if commenced, * * * more than one year after the occurrence of the loss or injury."

This action was commenced June 11, 1911, and more than one year after the accident whereby plaintiff was injured. The sole question for our decision is whether the statute applies to this action. The original of § 768 was Laws 1897, c. 248. In construing the original Act, we held in effect that the clause therein, "or by reason of the negligence of its officers, agents or servants," was not germane to the title to the Act; hence no effect was given to it prior to the revision of 1905. *Winters v. City of Duluth*, 82 Minn. 127, 84 N. W. 788; *Meggins v. City of Duluth*, 97 Minn. 23, 106 N. W. 89. This clause, however, as it appears in § 768 of the revision, is valid. Therefore full effect must be given to it, for it can no more be eliminated by construction than the other provisions of the section. The section is a part of the revision, which became effective March 1, 1906, and was duly passed under an appropriate general title; hence the whole section is valid from that date. *State v. Barnes*, 108 Minn. 230, 122 N. W. 11.

It is clear from the allegations of the complaint that the plaintiff's injury resulted from the negligence of some of the officers, agents, or servants of the village. In blasting the rock in the street the municipality was of necessity acting by such agents or servants, who were negligent in not taking the necessary precautions to prevent pieces of the rock being thrown beyond the limits of the street. The gist of the action is such negligence, and it is not a common-law action for maintaining a nuisance, as claimed by the plaintiff; for the complaint cannot be fairly so construed. The trial court was of the opinion that this action was not within the statute, because the village itself was engaged in doing the blasting, and was as fully informed as any other employer would be under like circumstances.

The cases of *Kelly v. Faribault*, 95 Minn. 293, 104 N. W. 231, and *Pesek v. New Prague*, 97 Minn. 171, 106 N. W. 305, holding that the statute does not apply to the case of a laborer injured while in the services of the municipality by its negligence in not providing a safe place in which to work, are cited in this connection. Each of these cases arose prior to the time when the revision became effective, and neither is here controlling. It follows that we must give some effect to the clause in question; for it is valid, and cannot be eliminated by construction, even if the court were unable to see any good reason for its enactment. The statute being within the power of the Legislature, it was the exclusive judge of the necessity and reason for its enactment. The reason for it, however, is manifest. A municipality, unlike a personal employer, can only be present and act in the execution of municipal work by its agents or servants, who are constantly changing. It is therefore important that it be informed within a reasonable time of the circumstances of an accident occurring in the execution of its work and resulting in injury to a claimant, so that it may be able intelligently to investigate the merits of the claim before the employees who were in charge of the work leave its employment. We hold that this action is within the statute and that the complaint does not state a cause of action.

Order reversed.

WILLSON v. BOISE CITY.

[SUPREME COURT OF IDAHO, JUNE 28, 1911.]

20 Idaho, 133, 117 Pac. 115.

1. Municipal Corporations—Diversion of Stream—Insufficiency of Channel—Floods—Liability.

Where a city diverts a stream of water from its natural channel and undertakes to convey the same by means of an artificial channel or canal, it should be held liable for the exercise of reasonable care and diligence in constructing a channel of sufficient size to carry the volume of water that may be reasonably anticipated or expected to flow down the same and for the maintenance of the same in a reasonably safe condition.

2. Municipal Corporations—Diversion of Stream—Artificial Channel—Injury by Flood—Liability.

A municipality will not be exempt from liability for damages on account of failure to maintain a sufficient artificial channel to carry off the water of a stream that it has diverted from its natural channel, merely on the grounds that the flooding and overflow was caused by an unusually heavy rainfall or cloud-burst the like of which has not usually occurred, where it appears that a number of such rainfalls or cloud-bursts have occurred in the same locality within the last preceding 15 or 20 years.

3. Municipal Corporations—Diversion of Stream—Cloud-burst—Liability.

A rainfall or cloud-burst which has irregularly and infrequently occurred a number of times within the memory of man in a particular locality, and has caused heavy freshets in a particular stream, is a thing that can reasonably be expected to occur again, and is therefore not classed as vis major or the "act of God," for which the law of negligence and damages does not hold any human agency responsible.

4. Municipal Corporations—Diversion of Stream—Cloud-burst—Liability.

A heavy rainfall or cloud-burst and consequent floods unprecedented and so extraordinary as to have been beyond reasonable anticipation, and such as had not been known to occur in the locality for a long series of years, is classed in law as the "act of God," and no liability attaches to any one for the damages done thereby.

[Headnotes by the Court.]

Appeal by defendant from a judgment of the District Court of the Third Judicial District for Ada County, rendered in an action brought by Emilie Willson against Boise City to recover damages for injuries caused by floods. Affirmed

For appellant—P. E. Cavaney.

NOTE.

On the subject of Liability for Injuries to Property, caused by Overflow of Surface Water, etc., see note in 21 Am. Neg. Rep. 479-484.

For cases in which "Act of God" was interposed as a defense, see note in 15 Am. Neg. Rep. 360-372.

For respondent—Hawley, Puckett & Hawley.

AILSHIE, P. J. This action was instituted by the plaintiff against Boise City to recover damages caused by flooding and overflowing her property and the property of twenty others whose claims for damages had been assigned to the plaintiff.

It appears that on about the 19th of June, 1909, a heavy rainfall, or what is commonly called a "cloud-burst," occurred in the foothills east of Boise City and in the vicinity of what is known as "Cottonwood Canyon." As a result a large body of water collected in the Cottonwood creek and carried a great quantity of sand, gravel, and debris down the stream and deposited it on the town lots of the plaintiff and her assignors, doing great damage to the lots and flooding cellars and causing damage to the persons whose lots were flooded. It appears that in the early settlement of Boise City this stream in its natural course flowed down through what is now embraced in the lands of the Boise Barracks, and thence through the center of the present city and in the vicinity of the Capitol Building. This resulted in flooding and overflowing large tracts of land during the high-water season and at times of heavy rainfall, and so the city finally concluded to divert the course of the stream from the mouth of the canyon, and accordingly built what is designated as the "Cottonwood Flume" carrying the water almost in a southerly direction from the mouth of the canyon to the Boise river. This resulted in diverting the entire flow of the stream from its original course as it formerly left the mouth of the canyon and carries the water through a territory that had not previously been affected by the flow of the stream. It seems that at first the retaining walls along the east side of the military reserve were not built high enough to retain the water and prevent it overflowing the military reserve at times of extraordinary high water, and so the government caused the wall to be erected higher and in a more substantial manner for some distance along the government property, thus holding the water and carrying it past the reserve. From thence to the Boise river, the water is carried through a canal that is walled up on each side by substantial stone walls. The lots belonging to the plaintiff and her assignors lie on the east side of this canal. It seems that the canal is only large enough to carry the stream of water at ordinary high water, but it is not large enough to carry off the volume of water that comes down the stream at extreme high water or at times of cloud-bursts, or extraordinary heavy rains. Many years ago the city caused a dam to be constructed across the Cottonwood creek at the mouth of the canyon, and immediately above

the government retaining wall, for the purpose of causing an eddy in the stream and precipitating the large volume of sand that comes down the stream so as to prevent the greater quantity of the sand being carried into the canal. This dam was not a permanent or substantial structure. It appears that it had been constructed in a rather careless and negligent and temporary manner. When the heavy rain, or what is termed a "cloud-burst," occurred in June, 1909, this dam was carried out and with it large volumes of sand, silt, and debris were swept along by the flood and precipitated upon the lots of the plaintiff and her assignors.

There is no dispute in this case but that the injury and damage complained of was committed. The city does not dispute the fact that the lots were flooded and debris and sand deposited thereon, and the cellars and other excavations were flooded. It is insisted, however, by the city that it is not liable for this occurrence, and this contention is based upon the fact that it claims this was an unprecedented and unusual flood, and that it therefore falls within that class of occurrences which are attributed to vis major or act of God, for which there is no human responsibility. There is no occasion for citing or reviewing authorities to the effect that no responsibility attaches to the city if this act can be termed an "act of God." This court has twice had occasion to so hold on similar questions. *Axtell v. Northern Pac. R. Co.*, 9 Idaho, 392, 15 Am. Neg. Rep. 367, 74 Pac. 1075; *Lamb v. Licey*, 16 Idaho, 664, 21 Am. Neg. Rep. 85, 102 Pac. 378.

The decisive question, however, arises in this case as to what constitutes vis major or the act of God within the meaning of the law of negligence. Black in his Law Dictionary defines it thus: "Any misadventure or casualty is said to be caused by the "act of God" when it happens by the direct, immediate, and exclusive operation of the forces of nature uncontrolled or uninfluenced by the power of man and without human intervention, and is of such a character that it could not have been prevented or escaped from by any amount of foresight or prudence, or by any reasonable degree of care or diligence, or by the aid of any appliances which the situation of the party might reasonably require him to use."

The English court, in *Nitrophosphate, etc., v. London, etc., Docks Co.*, L. R., 9 Ch. Div. 516, said: "To say that the thing could not reasonably have been anticipated is to say that it was the act of God."

The Supreme Court of Alabama, in *Smith v. Western Ry.*, 91 Ala. 455, 8 South. 754, 11 L. R. A. 619, 24 Am. St. Rep. 929, in consider-

ing the liability of a railroad company for damages caused by heavy floods, gave the following definition: "While it is true that no human agency can prevent or stay an act of God, the act itself being that of omnipotence, and irresistible, it is frequently the case that the results or natural consequences of an act of God, by the exercise of reasonable foresight and prudence, may be foreseen and guarded against. Where this can be done by the exercise of reasonable diligence and prudence, the failure to do so would be negligence, and subject the party upon whom this duty devolved to damages, although the original cause was an act of God."

In *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 11 Am. Neg. Rep. 179, 31 South., 374, the court said: "The term 'act of God,' in its legal sense, applies only to events in nature so extraordinary that the history of the climatic variations and other conditions in the particular locality affords no reasonable warning of them, and, where injuries were caused by floating by a lumber company during a flood, damages could not be avoided on the grounds that the flood was an act of God, where, from geographical and climatic conditions, the flood might have been anticipated, though it occurred infrequently."

In *Kansas City v. King*, 65 Kan. 64, 15 Am. Neg. Rep. 145, 68 Pac. 1093, the Supreme Court of Kansas was considering the liability of the city for damages caused by flooding on account of the inadequacy of a sewer to carry off the flood waters. The court said: "It is true that the flood of 1892 may be said to have been an unusual one, but, although unusual, it was such as had occasionally occurred, and which the city should have anticipated and provided against. The testimony shows that such floods had occurred at irregular intervals, and that they would again occur might reasonably have been expected. It is true that floods unprecedented and so extraordinary as to have been beyond reasonable anticipation are not to be provided against; but while floods like the one which occasioned the injury were of rare occurrence in that vicinity, they had occurred so often in the past as to warrant the belief that the region was subject to them, and that, under the laws of nature, they would occur again. Ordinary care and foresight, therefore, required the city to provide against floods which were or should have been anticipated, and floods were shown to have occurred so frequently that those who constructed the sewers should have anticipated floods like that of 1892, and should have guarded against them by placing flood gates at the mouths of the sewers."

In *Ohio & Miss. Ry. Co. v. Ramey*, 139 Ill. 9, 28 N. E. 1087, 32 Am.

St. Rep. 176, the court was considering the liability of a railroad company for obstructing the flow of water in a stream by means of an embankment, thereby overflowing adjoining lands in time of unusual or extraordinary flood. The court said: "The principle clearly is that, although a rainfall may be more than ordinary yet if it be such as has occasionally occurred, and, it may be, at irregular intervals, it is to be foreseen that it will occur again, and it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it. It is within the knowledge of all who have long resided in this State that our streams are occasionally subject after intervals which are sometimes of shorter and at other times of longer duration, to great floods, occasioned by very heavy rainfalls, and their heights are known by those who have felt interested in them. Such rainfalls were not usual and ordinary, but they were unusual and beyond ordinary, i. e., they were extraordinary; and yet it is just as certain that like rainfalls will occur in the future as it is that the same laws of nature by which they are produced, and the same condition to be affected by those laws, will continue to exist in the future as they have in the past. Though of rare occurrence, such rainfalls are not phenomenal, and therefore beyond reasonable anticipation, and it is hence but the prudence that a discreet man would exercise in his own affairs to provide against injury from them. The question, then, is not whether appellant has sufficiently provided for the escape of the water of ordinary floods, but has it provided for the escape of the water of such unusual or extraordinary floods as it should have anticipated would occasionally occur in the future, because they had occasionally occurred after intervals, though of irregular duration in the past." See *Gulf, C. & S. F. Co. v. Boyce*, 39 Tex. Civ. App. 195, 20 Am. Neg. Rep. 689, 87 S. W. 395; *Central Trust Co. v. Wabash St. L. & P. Ry. Co.*, (C. C.), 57 Fed. 441; *Mahaffey v. Rumbarger Lumber Co.*, 61 W. Va. 571, 56 S. E. 893, 8 L. R. A. (N. S.) 1263; *Hyman v. Hauff*, 138 N. Y. 48, 33 N. E. 735.

In the case at bar, the city, in the first place, as a municipality was not obliged to divert the flow of Cottonwood creek from its original natural channel through the city. It had the power, however, to do so. *Willson v. Boise City*, 6 Idaho, 391, 5 Am. Neg. Rep. 314, 55 Pac. 887. Having exercised that power and diverted the stream from its original channel, and thereby saying to the residents along the original channel and course of the stream: "You now may build up and improve your property; the municipality will carry the water of this

stream in another direction"—it can no longer turn those waters loose in the original channel or course of the stream. The municipality has undertaken to control and direct the flow of the waters of this stream. It has done that presumably for the benefit of the whole community. Since it has assumed the control and direction of the stream, it cannot turn its water loose upon other property owners and flood and damage them without also assuming responsibility for such damages as may be sustained by the property owners on account of the negligence, or rather want of proper care and diligence upon the part of the city in providing for, directing, and controlling the flow of such stream.

It is argued by the city that the intervening act of the United States in erecting the retaining wall and preventing the water spreading out over the military reserve, and thus throwing the entire volume of water in the direction of the canal and respondent's premises, was the proximate cause of the injury, and that the city is therefore not liable. The weakness of this contention lies in the fact that the city had already assumed responsibility for the diversion of the stream from its natural channel, and it owed the same duty to the people along the original channel to prevent the water thereafter flowing in that direction as it owed to the people along the artificial channel to protect them by the exercise of ordinary care and diligence to prevent the flooding and overflowing of their lands. The fact that a property owner repaired the wall so as to protect his property does not relieve the city of the primary duty which rested on it and which it owed to all the people.

This question arose between the same parties in *Willson v. Boise City*, 6 Idaho, 391, 5 Am. Neg. Rep. 314, 55 Pac. 887, and the court held that the city was guilty of negligence in not constructing and maintaining a canal of sufficient size to convey the waters of Cottowood creek from the mouth of the canyon to the Boise river in times of high water. The court there announced what we conceive to be the correct rule as laid down in the last paragraph of the syllabus, as follows: "One who purchases land and improves the same on the line of an artificial waterway constructed by a municipal corporation may well rely upon such municipal corporation to perform the duty that it is under, of keeping such artificial waterway in repair and condition to carry off all of the waters that may flow therein from usual and ordinary causes, and may recover damages received by the negligent flooding of his lands by waters from such artificial waterway."

Returning again to the facts of this case, it appears that these heavy rains or cloud-bursts, such as occurred on the 19th of June, 1909, and for which damages are claimed, only occur at intervals of two, three, four, or five years apart. It seems that almost every year in the spring and early summer heavy rainfalls occur in the vicinity of Cottonwood creek, and that as a consequence large volumes of water come down the stream; but these cloud-bursts referred to as unusual and extraordinary do not occur every year, but have occurred a number of times within the last 15 or 20 years. In other words, they have occurred with sufficient frequency within the memory of man that they cannot be classed among the phenomenal or unprecedented outpourings of nature against which the city could not have reasonably provided or which could not have been reasonably guarded against. If it appeared in this case that this was such a heavy and unprecedented rainfall as had not occurred within the memory of man, as that term is defined by law, then certainly the city would not be liable. Such an act would properly be classed as the act of God for which there is no liability.

We are fully persuaded from the facts as they appear in the record in this case that Boise City has been negligent in maintaining this canal, and, the sooner the municipality wakes up to its responsibility and duty in this respect, the better it will be for the whole people, both in their collective capacity as a municipality and their individual capacity as citizens and taxpayers. The city has undertaken the care and maintenance of this stream. It must now afford the property owner reasonable protection against the ravages of the stream in times of high water. This court in *Willson v. Boise City*, *supra* [6 Idaho, 391, 5 Am. Neg. Rep. 314, 55 Pac. 887], 12 years ago, sounded the alarm to the city that it must take care of the waters of this stream; but the admonition seems to have gone the way of much good advice in this world, and now the city must pay in dollars and cents for what it might have reasonably prevented and protected the citizens against.

The judgment in this case should be affirmed, and it is so ordered; costs awarded in favor of respondent.

SULLIVAN, J., concurred.

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CAMPBELL v. CITY OF CHILLICOTHE.

[SUPREME COURT OF MISSOURI, DIVISION No. 2, FEBRUARY 6, 1912.]

239 Mo. 455.

1. Municipal Corporations—Gate—Obstruction on Walk—Injury—Liability.

A city which permits a wooden picket gate to remain in such a condition that, when not held in place, it stands open on and across the sidewalk, thereby constituting a dangerous obstruction on the walk, is liable to a pedestrian who is injured by running into the same on a dark night, if it had notice of the condition of the gate, or by the exercise of ordinary care could have discovered its condition in time to have removed the obstruction prior to the injury.

2. Municipal Corporations—Gate—Dangerous Obstruction—Sidewalk—Notice.

In an action against a city to recover damages for personal injuries sustained by a pedestrian who, on a dark night, ran into a wooden picket gate which constituted a dangerous obstruction on the sidewalk, it was error for the court to instruct the jury that there was no evidence that the city had any actual notice of the obstruction, where the proof shows that a member of the city council passed the gate three or four times a day, that it was poorly hung, and that a hinge thereon had been broken for at least a week before the accident.

3. Municipal Corporations—Obstruction on Sidewalk—Injury—Trial.

In an action brought against a city to recover damages for personal injuries sustained by a pedestrian who, on a dark night, ran into a wooden picket gate which constituted a dangerous obstruction on the sidewalk, it was error for the court to instruct the jury not to take into consideration the fact that no electric light was burning at the corner nearest the place where the injury was sustained; such fact being proper evidence to show why the person injured did not see the obstruction.

Appeal by plaintiff, Thomas C. Campbell, from a judgment of the Circuit Court of Linn County, rendered in favor of defendant, City of Chillicothe, in an action brought to recover damages for personal injuries caused by an alleged dangerous obstruction permitted to remain upon the sidewalk. Reversed.

For appellant—Scott J. Miller and Chas. M. Miller.

For respondent—Frank W. Ashby, and Frank Sheetz & Son.

STATEMENT OF FACTS: The defendant is a municipal corporation under a special charter, having at the time of the trial a population of about 10,000.

The facts constituting the negligence are stated in the petition as

NOTE.

On the subject of Liability for Injuries Caused by Obstruction on Side-

walk, see notes in 3 Am. Neg. Rep. 304; 6 Am. Neg. Rep. 349, 356; 8 Am. Neg. Rep. 250.

follows: "That on or about February 20, 1906, and for a long time prior thereto, there was a certain gate (which was about 3 feet high and $3\frac{1}{2}$ feet long) so hung or fastened to a post or fence so that in opening said gate, or when opened, it would swing out over and stand on said street and sidewalk within and upon the east side of Elm street, and in front of a house and lot situated and abutting on said sidewalk and street, known as No. 823 Elm street, in said city. That said gate, when so hung or fastened, as aforesaid, and when opened on said street and sidewalk, constituted a dangerous obstruction and a nuisance on said street and sidewalk, and persons passing thereon were liable to be injured by reason of said gate and obstruction. Plaintiff further states on or about February 20, 1906, and for a long time prior thereto, that the defendant carelessly and negligently maintained and caused or permitted said gate to be so hung or fastened, as aforesaid, well knowing that said gate was dangerous, and that it would be open many times a day and night, and when open it would stand out on and over said sidewalk and street, and would constitute a dangerous obstruction and a nuisance in and upon said sidewalk and street, and that persons passing along and over said sidewalk and street would be liable to be injured thereby, and that said gate and obstruction was negligently and carelessly caused or permitted by said defendant to be and remain in a dangerous and defective condition, and to habitually stand open in and on said sidewalk and street for a great length of time prior to and including the 20th day of February, 1906; that the defendant knew, or by the exercise of ordinary care would have known, of the existence of said gate, and that it was so hung or fastened, as aforesaid, and was in a defective condition, and habitually stood open in and on said sidewalk and street, and of the dangerous condition of said sidewalk and street by reason thereof, in time, by the exercise of ordinary care, to have caused said gate and obstruction to be removed and said sidewalk and street made secure and safe before plaintiff was injured, but carelessly and negligently failed and neglected to do so." The answer is a general denial, with a plea of contributory negligence.

Plaintiff was a citizen of Chillicothe, a traveling salesman, and on returning home on the night of February 20, 1906, a dark night, with a misting rain, he ran into or against a wooden picket gate in front of the residence of Mr. Theodore Carpenter and broke both bones of his leg just above the ankle. The gate was standing more or less open out, on, or across the sidewalk. The nearest street light, about a block distant, was out. The gate was about two blocks from the

public square, and about one block from the plaintiff's residence. The gate, having been removed from its place in the gateway, was rehung some time in November, 1905, and, after being up a few weeks, was knocked down or torn down in some way, and, after setting in the yard for a considerable time, was again rehung in its old place, with a strap hinge below and a door screen hinge, with a spring, at the top. Plaintiff's evidence tended to show that it was hung the last time six or eight weeks before the injury, and that the top hinge was broken, so as not to hold the gate, for a week or more before the injury. Defendant's evidence tended to show that the last hanging of the gate was a week or ten days before the injury, and the breaking of the top hinge two days before the injury. Mr. Grace, a member of the city council, passed there on the sidewalk three or four times a day. There was evidence tending to show that the gate usually stood open, and evidence to the effect that it was kept closed. A witness for defendant testified the gate would naturally lean out if not kept closed; and another testified that the latch would not fasten, but that by pulling the gate in between the posts it would remain there tight.

Among other instructions, the court gave the following at the instance of the defendant:

(2) "The court instructs the jury that the fact that the electric light was not burning on the corner of Calhoun and Elm street at the time the plaintiff alleges he was injured, is no evidence against the defendant of any negligence, and you will not, therefore, consider it."

(3) "The court instructs the jury that the city is not an insurer or warrantor of the condition of its sidewalks; nor is every obstruction thereon actionable, though it may have caused the injury sued for. And, though you may believe from the evidence that the gate in question did, when open, swing over the line of the sidewalk, still a property owner abutting on a sidewalk has a right to make a proper and reasonable use thereof, as long as such use is consistent with the easement of the public to pass over it. Therefore, if you believe from the evidence that the gate in question, when closed, afforded a reasonably safe sidewalk for public use, you cannot find for plaintiff because of the fact that said gate did, when in a proper condition of repair and opened for the purpose of enabling persons to pass in and out of the premises, open and swing outward and partially across the sidewalk at a point where the injury is said to have occurred."

(7) "The court instructs the jury that there is no evidence in

this case that the defendant city had any actual notice that the gate mentioned in the evidence was standing upon or over the sidewalk."

(8) "The court instructs the jury that if they believe from the evidence that the gate mentioned in the evidence was put in place on February 13, 1906, then, before the plaintiff can recover in this case, he must show to your satisfaction, by a preponderance of the evidence, not only that the gate was standing or hanging over the sidewalk after that date, but, also, that said gate was so standing open over said sidewalk a sufficient length of time prior to the accident that the defendant, by the exercise of ordinary care, could have discovered the same, and, unless the plaintiff has so shown, your verdict must be for the defendant."

ROY, C., (after stating the foregoing facts). The obligation of a city to keep its streets and sidewalks in repair is not limited to the defects existing in a street. Dangerous ditches, excavations, and walls by the side of a sidewalk are within the rule holding a city liable. *Kiley v. Kansas City*, 87 Mo. 103, 56 Am. Rep. 443; *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Halpin v. Kansas City*, 76 Mo. 335; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528.

In *Kiley v. Kansas City*, *supra*, it was held the duty of the city to guard against injuries to persons using a sidewalk by the falling of a dangerous wall standing on the side of the street; and in *Franke v. St. Louis*, 110 Mo. 516, 19 S. W. 938, the city was held liable for negligently permitting the wall of a burned building to stand on the side of a sidewalk with loose stones therein, which fell and injured the passer-by on the sidewalk.

It has been very recently held in Massachusetts, in *Keating v. City of Boston*, 206 Mass. 327, 92 N. E. 431, that a jury is warranted in finding that a coalhole cover which, when stepped upon, will tip up, unless fastened, is so likely to be unfastened that a city which used reasonable diligence after it had, or in the exercise of proper care might have had, notice of this condition would not allow it to be there at all.

If the gate was so constructed and used that at times, while no one was passing through or holding the same, it would stand open on or across the sidewalk, so as to be an obstruction to the sidewalk, and if its condition and use in that respect were such that an ordinarily prudent person, responsible for and knowing its condition and use, would have remedied the same, then the city is liable, provided it had notice of that condition, or by the exercise of ordinary care could have discovered it, in time to remedy it prior to the injury. In order

that a city be held responsible for injury by a falling wall, it is not necessary that the city should know that the wall is falling. It is sufficient that it knows the wall is so liable to fall that ordinary care requires its abatement. So in this case it was not necessary that the city should know that the gate was standing open at the particular time of the injury. It was sufficient if the city knew, or by the exercise of ordinary care and caution would have known, the condition and use of said gate, in time to remedy the same before the injury. Such being the law, instructions Nos. 3 and 8, given for defendant, were clearly wrong.

Instruction No. 7 is erroneous. It is true that there was no direct evidence of notice; but there was circumstantial evidence from which the jury might infer notice. This same instruction was held reversible error in the case of *Clark v. Brookfield*, 97 Mo. App. 16, 70 S. W. 934. The evidence, as above stated, shows that Mr. Grace, a member of the city council, passed several times a day along the sidewalk by that gate, and from that fact the jury might have inferred that the city had notice. Besides, there was other evidence tending to the same effect.

Instruction No. 2 is erroneous. The fact that the electric light was not burning was not evidence of negligence on the part of defendant; but it was proper evidence going to show why it was that plaintiff did not see the obstruction, and the jury had a right to consider it for that purpose.

Respondent makes the point that, although there was an exception to the giving of defendant's instructions, there was no objection made to such instructions. It is insisted that under the ruling in *Sheets v. Insurance Co.*, 225 Mo. 613, 126 S. W. 413, the question is not properly before the court. That case was expressly overruled as to that point in *Harding v. Railroad Co.*, 232 Mo. 444, 134 S. W. 641.

The judgment is reversed, and the cause remanded.

BOND, C., concurs.

PER CURIAM. The above and foregoing opinion is adopted by the court, all the judges concurring.

LOWERY v. WALKER.

[HOUSE OF LORDS (ENGLISH APPEAL), NOVEMBER 9, 1910.]

L. R. [1911] App. Cas. 10, 80 L. J. K. B. 138.

1. Court—Findings—Explanation.

A county court judge may properly explain in writing the sense of an ambiguous word which he has used in giving judgment.

2. Animals—Negligence—Injuries.

One who, without giving any warning whatever, places a savage horse with dangerous propensities in a field which he has permitted the public habitually to cross, is liable to a person injured by the animal.

Appeal from a decision of the Court of Appeal, which affirmed an order of the King's Bench Division reversing a judgment of the Whitehaven County Court, in an action brought to recover damages for personal injuries caused by being bit by a savage horse as plaintiff was crossing a field. Appeal allowed.

For appellant—Holman Gregory, K. C., and W. A. Jowitt.

For respondent—Leslie Scott, K. C., and H. Beazley.

STATEMENT OF FACTS: Defendant was a farmer and kept in one of his fields a horse which he knew was savage and had bitten human beings. Plaintiff while trespassing in the field was bitten by the horse. On the trial of the action in the Whitehaven County Court evidence was given that for thirty or forty years the public had crossed the field by a track on their way to a railway station, and that defendant had

NOTE.

On the subject of **Liability of Owner of Animals for Injury to Persons Attacked**, see note in 21 Am. Neg. Rep. 359.

And for cases arising out of **Injuries to Persons by Animals**, see 1 Am. Neg. Cas., where the "Animal Cases" decided in the courts of last resort in all the States and Territories and in the Federal and Supreme courts of the United States, from the earliest period to 1895, are classified and grouped in

alphabetical order of States, and where notes of numerous English cases are appended.

And for subsequent actions on the same topic to date, see Vols. 1-21 Am. Neg. Rep., and also this volume (1 N. O. C. A.) and succeeding volumes of **Negligence and Compensation Cases Annotated**.

And for a review of "Animal Cases" decided from 1897 to 1907 and reported in Vols. 1-20 Am. Neg. Rep., see the title "Animals" in the American Negligence Digest.

warned off persons as trespassers and had complained to the police, but had declined to take proceedings because some of the persons were his customers for milk. The county court judge gave judgment for plaintiff for £100 damages and defendant appealed.

The county court judge made a note of his decision in which he wrote: "No doubt the plaintiff was a trespasser." Some days after rendering judgment but before notice of appeal was given the county court judge added to his note these words: "On the question of trespass I came to no definite conclusion. The defendant only occupied for fifteen years. I had evidence of the use of the path for thirty or forty years. The defendant put up a notice fifteen years ago but would not prosecute."

The Divisional Court (DARLING and PICKFORD, JJ.,) set aside the judgment and entered judgment for the respondent, and this decision was affirmed by the Court of Appeal (VAUGHAN WILLIAMS and KENNEDY, L. JJ., affirming, and BUCKLEY, L. J., dissenting). See [1909] 2 K. B. 433, and [1910] 1 K. B. 173.

LORD LOREBURN, L. C. My Lords, I think this case should be determined upon the actual findings of the learned county court judge. It is true there has been some question about what he decided, and it appears that some little time after he had delivered the judgment he made an alteration in regard to a phrase he used. I think it was quite legitimate to do so, because the word he used was capable of being misunderstood, or understood in one sense rather than in another, and I see no objection to his explaining to the Court and to the parties the sense in which he used the word.

He has found certain facts. He has not found them according to the letter of legal phraseology, but he has presented to us a view of the facts; and I think what that view—by which we are bound—amounts to is this: He will not find whether there was a right of way or not; therefore the plaintiff did not establish that he was in the field according to a right to be in the field. Again the learned judge, I think, found that there was no express leave given to the plaintiff to be in that field; but I think the effect of his finding is that the plaintiff was there with the permission of the defendant, because he finds that the field had been habitually used by the public as a short cut, and he says that the defendant was guilty of negligence in putting a horse which he knew to be dangerous into a field which he knew was habitually used by the public. That being the case we ought not to refine upon the language which the learned Judge has used. Perhaps it would have been better—indeed I think it would

have been better—had he been more explicit in saying what it was that he did find and what it was that he did not find; but I think in substance it amounts to this: that the plaintiff was not proved to be in this field of right; that he was there as one of the public who habitually used the field to the knowledge of the defendant; that the defendant did not take steps to prevent that user; and in those circumstances it cannot be lawful that the defendant should with impunity allow a horse which he knew to be a savage and dangerous beast to be loose in that field without giving any warning whatever, either to the plaintiff or to the public, of the dangerous character of the animal.

I will not enter upon the further field of law—itself somewhat wide and not free from many difficulties—because I do not think the facts of this case require it.

Under those circumstances and for those reasons I think the appeal ought to be allowed.

EARL OF HALSBURY. My Lords, I entirely concur with the judgment which the Lord Chancellor has delivered and for the reasons which he has given, and I only wish to say one additional word with regard to the question of what the learned county court judge has found. The learned judge used an ambiguous word. I suppose nine out of ten people would distinguish between a person who was at a place as of right and a person who was a mere trespasser. The learned judge did, I think inadvertently, in the first instance use the word “trespasser,” which would have carried the learned counsel for the respondent all the way he wants to get, to a somewhat difficult and intricate question of law upon which various views may be entertained. But seeing that there was a misapprehension, or might be a misapprehension, in the sense in which he used the word “trespasser,” the learned judge himself points out in terms that he does not find, and did not intend to find,—as I think indeed the whole substance of his judgment shows he did not intend to find—that the injured man was a trespasser in the sense in which that word is strictly and technically used in law.

My Lords, I think we are bound by the finding of the learned judge, and I should hesitate very much to assent to the view which Vaughan Williams, L. J., seems to have entertained, that there was something wrong in his adding that to his note. He candidly admits that it was added afterwards; but what he says in effect is this: I have used an ambiguous word, and I wish to be understood that when I used that word I did not use it in the technical sense of the law. My Lords, I think we are bound not only by the original finding of fact,

but by what he says he intended to convey by his words. It is not, as the learned counsel for the respondent suggested, that the learned judge has changed his mind afterwards, which I quite agree would be quite inconsistent with the Act of Parliament, but what he does say is: I have used a word which I think upon reflection is capable of being misunderstood and I now want to explain in what sense I have used the word. I think he was entitled to do that, just as any one of us here, in looking over a judgment afterwards, may think we have used an inappropriate word and may substitute one that is more appropriate to the occasion.

As to the other question which was intended to be argued by the learned counsel for the respondent, who I am afraid is disappointed because the view which we take prevents that question arising, I will only say that I myself would absolutely decline to give any judgment upon that subject, because in this case I am of the opinion that what the learned judge has done has prevented that question arising. In his finding he has raised the real proposition with which we are dealing, namely, whether or not a person who knows that the public are going over his ground, and going over it habitually, is entitled without warning or notice, or any other precaution whatsoever, to put a dangerous beast where he knows it may be probable—and almost certain if the thing continues—that the beast will sooner or later do some injury to persons crossing this ground, and crossing it in one sense with his permission—not that he has given direct permission, but that he has declined to interfere and so acquiesced in their crossing it. If he has acquiesced in their doing so, he is bound to take the ordinary precautions to prevent persons going into a dangerous place where he knows they are going, and going by his acquiescence without notice or warning or any form of security to prevent the injury happening which did happen.

Under those circumstances, my Lords, I am of opinion that the judgment appealed from ought to be reversed.

LORD ATKINSON. My Lords, I concur. On the interpretation which I think is most rightly and properly put upon the findings of the learned county court judge, it is clear that the plaintiff was lawfully in the place where the injury happened to him. That being so, it is clear, I think, upon authority, that the respondent owed a duty to him to take care of this dangerous animal which the respondent put there and which injured the plaintiff by the very vices of which the respondent was well aware.

LORD SHAW (of DUNFERMLINE). My Lords, 'I should think it strange if a learned county court judge should not be permitted to explain deliberately in writing what he has said in giving judgment, so as to avoid any possible misconception or misconstruction of the language he has employed. I am glad to know from your Lordships that there is no rule of procedure which forbids that by the law of England. In the present case, accordingly, looking at the findings of the learned judge, I observe that they are threefold: First, that the place where this unfortunate attack took place was habitually used by passengers on foot, and this to the knowledge of the defendant; secondly, that the horse was, and was known by the defendant to be, a dangerous animal with savage propensities; and, thirdly, that the horse, with these known vices, was put by the defendant in that place so habitually traversed. In those circumstances, my Lords, I have no doubt that liability attaches to a defendant so acting.

I specially desire, my Lords, to reserve any opinion as to the further doctrine—applicable to the case of a mere trespasser as such—and further to add that I must not be held as in any respect assenting to the pronouncements by Darling, J., and Vaughan Williams, L. J., on that larger topic.

Order of the Court of Appeal and order of the King's Bench Division reversed. Judgment of Judge Steavenson restored with costs here and below; the costs here on the pauper scale. [Lords' Journals, November 9, 1910.]

DAWSON & COMPANY v. BINGLEY URBAN COUNCIL.

[COURT OF APPEAL, KING'S BENCH DIVISION, MARCH 9, 1911.]

L. R. [1911] 2 K. B. 149, 80 L. J. K. B. 842.

Municipal Corporations—Misfeasance—Fire.

The placing by urban authorities, in violation of their statutory duties, of a plate in the street with a misleading direction as to the situation of the fire plug, is an act of misfeasance rendering them liable to one whose building was consumed by fire because of delay in promptly locating the fire plug.

Appeal by plaintiffs from the judgment of Grantham, J., after trial with a special jury at Leeds of an action brought to recover damages for destruction of property by fire on account of lack of water, due to erroneous directions as to location of fire plug. Appeal allowed.

For plaintiffs—Mr. Waugh, K. C., and Richard Watson.

For defendants—Mr. Tindal Atkinson, K. C., and Joshua Scholefield.

STATEMENT OF FACTS: The plaintiffs were the owners and occupiers of premises fronting upon Clyde Street, Bingley, in the county of York, where there carried on business as yarn and waste merchants.

The defendants were the urban authority for the urban district of Bingley. They had assumed the position of fire authority and had taken over the control of the fire brigade.

The defendants had caused a fire plug to be provided in the street, forty-eight feet to the northwest of the plaintiff's premises, and had put up a plate purporting to indicate the position of the fire plug. It had originally been intended to put up the plate immediately opposite the plug, but as the owner of the opposite premises objected, it had been put up on adjoining premises in a position 6 feet 10 inches to the east. The plate, however, had inadvertently been left as originally marked—namely, "F. P. 22 ft. 3 in."—so that it did not correctly indicate the position of the fire plug.

In consequence of repairs to the street which were not carried out by or on behalf of the defendants, the fire plug had become covered to a depth of about six inches with a deposit of earth and ashes.

NOTE.

On the subject of Liability for Loss of Property by Fire Caused by Failure	of or Inadequate Supply of Water, see note in 21 Am. Neg. Rep. 70.
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On January 20, 1909, during the afternoon, a fire broke out upon the plaintiff's premises in a drying house. The alarm was at once sent to the fire brigade station, and within a few minutes the fire brigade arrived at the scene of the fire and ran out lines of hose to another fire plug and to an adjoining canal. Owing to the fire plug in question being covered over, and its distance being incorrectly described upon the plug plate, some delay, estimated by the plaintiffs at upwards of fifteen minutes, but by the defendants at six minutes, was occasioned in finding the fire plug and attaching a hydrant thereto and obtaining water therefrom.

The fire spread from the drying house, where it broke out, to the dyeing house, and eventually to the pulling house, and was not extinguished until it had occasioned very considerable damage to the premises.

On July 19, 1909, the plaintiffs brought the present action against the defendants for damage which they alleged they had sustained by reason of the misfeasance of the defendants in the repair of the street by improperly covering up a fire plug in the street, and by their failure to denote the situation of the fire plug as required by statute.

The plaintiffs in their statement of claim alleged (para. 2) that as urban authority it was the duty of the defendants to level, pave, metal, flag, channel, alter, repair the street which was within the defendants' district, and which, being repairable by the inhabitants at large, was vested in and was under the control of the defendants and (or) in fact the street had been repaired by the inhabitants; (para. 3) that in accordance with section 66 of the Public Health Act, 1875, it was the duty of the defendants to cause fire plugs and all necessary works for securing an efficient supply of water in case of fire to be provided and maintained in the street and also to paint or mark on the buildings and works within the street words or marks near to such fire plugs to denote the situation thereof, and to do all such other things for the said purposes as might be expedient; (para. 4) that the defendants were guilty of negligence and misfeasance in the performance of their said duty and (or) in the carrying out of the repairs in that they buried to a depth of about six inches a fire plug situated at a distance of about sixteen yards from the nearest point of plaintiffs' premises in a north-westerly direction; (para. 5) that the defendants were also guilty of further negligence and misfeasance in the performance of their said duty in that (a) no proper means were taken by the defendants to denote the exact position of the plug, inasmuch as the plate mark indicating the fire plug, so far from being in a prominent position, was

placed underneath the sill or bottom part of a shop window and was not easily discernible, (b) the said plate mark was not opposite or near to the said fire plug, (c) the said fire plug was buried beneath the surface of the street, under a layer of earth of about six inches in depth; (para. 6) that the efforts of the fire brigade and of the defendants to extinguish the fire were very considerably retarded by the fact that, owing to the acts of negligence and misfeasance before referred to, a delay of between fifteen and twenty minutes was occasioned in finding the fire plug and attaching a hydrant thereto; (para. 7) that the delay enabled the fire to develop to such an extent that the damage was largely occasioned and (or) increased thereby; and (para. 9) that by reason of the defendants' said acts of negligence and misfeasance the plaintiffs had sustained considerable damage; and the plaintiffs claimed damages.

The defendants in their defense stated (para. 1) that they admitted that a portion of Clyde Street was repairable by them, but as to the remaining portion (including the part where the fire plug was situated) they denied that it was their duty to level, pave, metal, flag, channel, alter, or repair the same; (para. 2) that they denied that they were under the duty alleged in paragraph 3 of the statement of claim; (para. 3) that any duty imposed upon the defendants in respect of the provision and (or) maintenance of fire plugs arose under sections 38 and 39 of the Waterworks Clauses Act, 1847, which was in force in the water-supply area of the defendants' district, within which lay the plaintiffs' premises, and the fire plug by reason of its incorporation in the Bingley Improvement Act, 1847, (10 & 11 Vict. c. cclvii), the Bingley Extension and Improvement Act, 1867 (30 & 31 Vict. c. lxxxviii), and the Bingley Water and Improvement Act, 1881 (44 & 45 Vict. c. clxxxiv), or some one or more of such Acts; (para. 4) that the defendants, in fulfillment of the duty imposed on them by the Waterworks Clauses Act, 1847, provided in Clyde Street a sufficient fire plug situate to the northwest of the plaintiffs' premises and at a distance of forty-eight feet therefrom, being the one referred to in the statement of claim; that the situation of the fire plug was denoted by a mark placed on the wall in the street, which at the time when the fire plug was fixed was most nearly adjacent to it; that the mark was, in fact, near to the fire plug, and in a prominent position; and that in fixing the situation and character of the mark the defendants' *bona fide* and duly exercised the duty imposed upon them by section 39 of the Waterworks Clauses Act, 1847, and that the fire plug was maintained as required by that enactment; (para. 6) that the defendants denied that they were guilty of any negligence or misfeasance as alleged in paragraph 4 of the statement of claim or at all, and that

they did not carry out any repairs to the street in the portion thereof wherein lay the fire plug referred to in the statement of claim, nor did they bury the fire plug to a depth of six inches or at all; (para. 7) that if the fire plug was buried at all it was buried with a layer of ashes to a depth of two inches only, and such burying was not done by the defendants, or by any person for or in respect of whose acts the defendants were responsible; (para. 9) that the defendants denied that they were guilty of the further negligence or misfeasance alleged in paragraph 5 of the statement of claim, and they repeated the statements contained in the first eight paragraphs of their defence; (para. 10) that the Waterworks Clauses Act, 1847, which created the duty referred to in paragraph 3 of the defence for the supposed breach whereof the action was brought, gave a specific remedy, to wit, the penalty imposed by section 43 of that Act, and the plaintiffs had no right of action in respect of damages arising from such breach; (para. 11) that the duty (if any) imposed by section 66 of the Public Health Act, 1875, was not a duty towards the plaintiffs, or any other individuals, but towards and for the benefit and purposes of the defendants' whole district, and was not one for a breach of which (if any) the plaintiffs were entitled to sue in the action; (para. 12) that if any duty was left unfulfilled by the defendants their omission was an act of nonfeasance for which no action lay; (para. 13) that within a few minutes from the receipt of the alarm the brigade was on the scene of the fire and at once ran out a line of hose from the fire plug nearest to the plaintiffs' premises, that the defendants' fire engines arrived shortly afterwards, and four more lines of hose were working with water from a canal which ran past the plaintiffs' premises, and that after a lapse of six minutes, and not between fifteen and twenty minutes as alleged, a sixth line of hose was worked from the fire plug referred to in the statement of claim, and that save as aforesaid every allegation in paragraph 6 of the statement of claim was denied; (para. 14) that the defendants denied the allegation in paragraph 7 of the statement of claim, and that no damage had been caused to plaintiffs' property through any negligence or misfeasance on the part of the defendants or in consequence of any act done or omitted by them; and (para. 15) that each allegation as to damage was denied.

It appeared in evidence that the part of Clyde Street in which the fire plug in question was situated was not in fact vested in or under the control of the defendants, or repairable by the inhabitants at large.

The learned judge put to the jury the following questions, to which the jury returned the following answers: 1. Q. Was there negli-

gence in the defendants not keeping the plug level with the surface of the road? A. Yes. 2. Q. Was there negligence in not indicating on the plug plate the position of the plug? A. Yes. 3. Q. Did the defendants bring to and place ashes or other material on the road so as to cover up the fire plug? A. There is no evidence that the defendants covered up the plug. 4. Q. Did the delay in finding plug A allow the fire to make headway to a greater extent than it would have done if the hose could have been attached to plug A on the arrival of the reel cart? A. Yes. 5. Q. Could the fire have been kept to the drying house if the hose had been attached to plug A at once? A. No. 6. Q. If the fire could not have been kept to the drying house, could it have been kept to the drying and dyeing houses? A. Yes. 7. Q. If kept to those two houses would it have been kept in so as to save the loss of the pulling house? A. Yes. 8. Q. If it could not have been kept in so as to save the whole loss of the pulling house, could it have been kept in so as to save some loss to the property? A. No. No. 8 is answered by No. 7. 9. Q. If so, how much? A. £512.

On October 28, 1910, on the further consideration of the action, the learned judge, having regard to the evidence and findings, held that the part of the street in which the fire plug in question was situated was not under the control of the defendants, that the defendants did not cover up the fire plug, and that they were not responsible for its having been covered up. He further held that the statutory duty of the defendants to put up the plug plate did not oblige them in all circumstances to put up a plate which indicated with absolute accuracy to within a foot of the position of the plug, and that the defendants in putting the plate where it was had in the circumstances substantially carried out their duty, and, moreover, that the duty of the defendants to put up the plate was imposed on them by the Waterworks Clauses Act, 1847, and that the authorities showed that their failure (if any) to carry out their public statutory duty would not entitle an individual who had been injured to maintain an action against them. He therefore, notwithstanding the findings of the jury, gave judgment for the defendants with costs.

On November 11, 1910, the plaintiffs gave notice of appeal that the judgment of the learned judge might be reversed and judgment entered for the plaintiffs for £512 and costs, or that a new trial might be had, on the grounds that, first, the judgment was wrong in law, and, secondly, that upon the findings, the evidence, and the admitted facts, the plaintiffs were in law entitled to judgment.

VAUGHAN WILLIAMS, L. J. Lord Halsbury in the case of *Shoreditch Corporation v. Bull*, 90 L. T. 210 (1904) says: "I am desirous

of not going beyond the facts and findings in this case for more reasons than one, and among them, conspicuously, is the reason that I think that some propositions in respect to the non-liability of the surveyor, or the local board now representing the surveyor, of highways may be pressed too far. At the same time I wish to express no difference of view from that which has been expressed before in this House. When the question is raised in a direct form it may be worth while to consider whether or not that which has been described as an act of nonfeasance in several of the cases in which that proposition has been applied, I think a little too widely, may not be considered misfeasance; but it is enough for the present case to say that according to the authorities there is enough here to show that the act which has been done was an alteration of the normal condition of the road, and if there was anything wrong either in the mode of carrying out the work or in the period of time which was allowed to elapse between the opening of the road and its becoming firm, or if in any other way the thing that was being done was negligently done, or if there was evidence for the jury that it was negligently done within any of the decisions which have been cited to us, it was an act of misfeasance for which the local or road authority under whose authority the thing was done was responsible." Lord Macnaghten and Lord Lindley concurred in this judgment and its reasoning.

I gather from this extract from the judgment of Lord Halsbury that, although well established authorities make it clear that public bodies representing the public are not liable to be sued by an individual member of the public who has sustained injury in consequence of the omission of such a body to perform a statutory duty created for the benefit of a class of which such person is one, yet the public body will be liable if by its acts it alters the normal condition of something which it has a statutory duty to provide or maintain and in consequence some person of a class for whose benefit the statutory duty is imposed is injured. The reason why the public body is liable in such a case is that it is not mere nonfeasance but misfeasance of the public body which has caused the injury; and I think, although it is not necessary to decide it in the present case, mere negligence by the public body in the course of the performance of its duty may constitute misfeasance if the result of negligent doing of the statutory duty makes that which the statute requires to be provided dangerous for those for whose benefit such statutory duty is imposed. I will now try to apply the principles which I think are to be deduced from the case of *Shoreditch Corporation v. Bull*, 90 L. T. 210 (1904), as decided in the House of Lords, to the present case.

The plaintiffs allege that the defendants, as urban authority, had the duty to level, pave, metal, flag, channel, alter, and repair a street within the urban district which, being repairable by the inhabitants at large, was vested in, and the control of, the defendants, and in fact had been repaired by them. It is admitted that this part of the claim cannot be supported, since the road was not in fact under the control of the defendants, or repairable by the inhabitants at large. Secondly, the plaintiffs complain that, in accordance with section 66 of the Public Health Act, 1875, it became and was the duty of the defendants to cause fire plugs and all necessary works, machinery, and assistance for securing a sufficient supply of water in case of fire to be provided and maintained in the said street, and also to paint or mark on buildings and walls within the said street words or marks near to such fire plugs to denote the situation thereof, and to do all such other things for the said purposes as might be expedient. The plaintiffs go on to allege that the defendants were guilty of negligence and misfeasance in the performance of their said duty and (or) in carrying out repairs in the said street, and that in the course of the repair of the said street they buried to a depth of about six inches a fire plug situate at a distance of about sixteen yards from the nearest point of the plaintiffs' premises in a northeasterly direction. It is also alleged that the defendants were guilty of negligence and misfeasance in the performance of their said duty under section 66 of the Public Health Act, 1875, and in particular it is alleged that the plate mark, which should have denoted the situation of the plug, was misleading and did not really denote the position of the plug, and that the operations of the fire brigade to extinguish a fire which had broken out in the factory of the plaintiffs were thereby delayed fifteen to twenty minutes in finding the plug, and that the said delay enabled the fire to develop to such an extent that the damage was largely occasioned and (or) increased thereby.

The questions put to the jury and the answers thereto were as follows: [His Lordship read the questions and answers as set out in the statement of facts and continued:] On these answers I think that the case for misfeasance depends entirely on the misleading notice on the plate which should have indicated the position of the plug; for I think that the answers to questions 1 and 3 indicate nonfeasance rather than misfeasance, but I am clear that on the evidence the answer to question 2 is a finding of misfeasance.

The only observation which I wish to add is that in my opinion the observations of James, L. J., in *Glossop v. Heston & Isleworth Local Board*, 12 Ch. D. 102, 109, cited by Lord Herschell in *Cowley v. New-*

market Local Board, A. C. 352 (1892) do not affect the law in this case. The learned Lord Justice says in the cited passage: "It appears to me that if this action could be sustained, it would be a very serious matter indeed for every ratepayer in England in any district in which there is any local authority upon which duties are cast for the benefit of the locality. If this action could be maintained, I do not see why it could not in a similar manner be maintained by every owner of land in that district who could allege that if there had been a proper system of sewage his property would be very much improved." The case in which this remark was made was a case of nonfeasance, and the present case is a case of misfeasance; the reasoning, however, might be applied to misfeasance. The observations of the Lord Justice may lead the Legislature to change the law and adopt a system of fines for misfeasance, but as the law stands I have no doubt actions lie for misfeasance by public bodies, and that the verdict of the jury must stand and the judgment of the learned judge be reversed.

FARWELL, L. J. The defendants are bound by section 66 of the Public Health Act, 1875, to cause fire plugs to be provided and maintained, "and they shall paint or mark on the buildings and walls within the streets words or marks near to such fire-plugs to denote"—that is, so as to denote—"the situation thereof." The object of this enactment is to insure that the position of the fire plugs shall be easily and correctly ascertained although the plug itself may be difficult to see by reason of snow or mud or the like covering it up.

In the present case a fire broke out, and the fire brigade turned out at once and found the pointer to the fire plug put by the defendants, but the pointer was wrong and misdirected the searchers to the extent of six feet ten inches. The result was that fifteen minutes were lost in finding the plug and a building was consumed that would otherwise have been saved. Notwithstanding the verdict of the jury to this effect, the learned judge has dismissed the action on the ground that the plaintiffs have no cause of action. I am unable to agree with him.

The breach of a statutory duty created for the benefit of an individual or a class is a tortious act, entitling any one who suffers damages therefrom to recover such damages against the tortfeasor. Thus in *Comyns' Dig.*, (5th ed.) p. 442, Action upon Statute (F), it is stated: "So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law:" and several precedents of declarations in case on statutes will be found in *Chitty's Pleadings* (6th

ed.) pp. 586 et seq. The breach of the statute is sufficient cause of action, because the tortious act, being done in breach of the statute, becomes by legal intendment an act done with intent to cause wrongful injury, just as a false and libellous statement is by legal intendment made maliciously. The act done or omitted may, apart from the statute, be innocent, or its omission may be not actionable, but the enactment makes it actionable. For instance, a man who *mero motu* put up a signpost on his own land by four cross-roads, but inadvertently put the arms wrong, would not be liable to any one misled; no action lies for an innocent misrepresentation: *Derry v. Peek*, 14 App. Cas. 337 (1889); but if he was under a statutory liability to put up and maintain a correct signpost, and made a similar mistake, he would be liable for breach of his statutory duty.

The generality of the foregoing observations must be restricted by omitting some cases, at any rate, of nonfeasance of duties enacted for the benefit of a body of men, and I am not concerned to consider whether the learned judge would have been right if this had been (as he thought it) nonfeasance and not misfeasance, because I am of opinion that this is misfeasance. The provision of a sign misdirecting inquirers may no doubt in a sense be said to be the non-provision of a correct sign, but it would certainly be wrong to read the commission of a wrong as the omission to do right in order to enable the defendant to escape liability: see Lord Halsbury's speech in *Shoreditch Corporation v. Bull*, 90 L. T. 210 (1904). The observations of James, L. J., in *Glossop v. Heston & Isleworth Local Board*, 12 Ch. D. 102, 109, must be read with reference to the case before the court, which was an application for a mandatory injunction to set up a scheme of drainage for a large district. If a man asks me the way to the Temple and I say nothing, I do not either direct or misdirect him; but if I direct him to Lincoln's Inn I misdirect him, although it may also be added that I fail to direct him to the Temple. I am therefore of opinion that this appeal should be allowed and judgment entered for the plaintiffs, in accordance with the verdict, for £512, with costs here and below.

KENNEDY, L. J. In this case the following facts appear upon the findings of the jury or have been proved by evidence adduced at the trial: (1.) The damage done by the fire was increased to the extent of £512 by the delay of the fire brigade in finding plug A. (2.) This delay was due to two causes: (a) the fire plug itself being covered up by two or more inches of dirt and ashes, (b) the misleading direction of the plate placed by the defendants at the side of the road to denote the position of the fire plug—"F. P. 22 ft. 3 in." A straight line drawn from the plate to the water main in the road

would fix the position of the fire plug six feet ten inches away from, and, if I understand the plan, to the northwest of its real position. (3.) The defendants, in placing the plate with the misleading direction, committed a breach of the statutory duty imposed upon them as the urban authority by section 66 of the Public Health Act, 1875, "to paint or mark on the buildings and walls within the said street words or marks near to such fire-plugs to denote the situation thereof;" and the jury have found expressly in their verdict that the defendants were guilty of negligence in not indicating on the plug plate the position of the plug. The jury also found that there was negligence on the part of the defendants in not keeping the plug itself level with the surface of the road; but, inasmuch as the road was not vested in the defendants and was not repairable by them, and (as the jury also expressly found) there was no evidence that the defendants had themselves placed upon the road the materials—dirt and ashes—which covered up the plug, the finding of the jury as to negligence of the defendants in not keeping the plug level with the surface of the road must, I think, be excluded from the consideration of the defendants' liability. At the same time, it is quite reasonable to hold that the defendants, when putting up the plate, ought to have borne in mind that, in the natural course of things, the fire plug might become covered and hidden by snow or dirt, as in fact it did, and that, if that should happen, serious consequences might ensue, as they have ensued, if the denoting plate, instead of giving a true index to the hidden plug, gave untrue and misleading directions. The finding by the jury of negligence on the part of the defendants in disobeying section 66 was certainly justifiable.

Upon the facts and findings I have stated, it is contended on behalf of the defendants, and my brother Grantham at the trial has held, that no legal liability has been established. It is argued that the things of which the plaintiffs complain—the placing of a plate with a misleading direction as to the situation of the fire plug, contrary to the duty imposed by section 66 to paint or mark so as to denote its situation—ought to be treated as, or as equivalent to, a nonfeasance, and therefore, say the defendants' counsel, not actionable. Now, the general law as to the remedy of a person who has been injured by the infringement of a statutory right or the breach of a statutory obligation for his benefit is clear. Where the statute has not in express terms given a remedy, the remedy which by law is properly applicable to the right or the obligation follows as an incident. The law is, I think, correctly stated in Addison on Torts (8th ed.) p. 104, referring to Comyn's Digest: "In every case where a statute enacts or prohibits a thing

for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law: Com. Dig., Action upon Statute (F.). Accordingly, where the statute is silent as to the remedy, the Legislature is to be taken as intending the ordinary result; and the proper remedy for breach of the statute is an action for damages, and, in a proper case, for an injunction." In the present case, the plaintiffs, who have been injured by the defendants' breach of the duty imposed upon them by the Public Health Act, 1875, § 66, rely upon the general principle of law which is, as I have said, in my opinion, correctly stated by Mr. Addison in the passage which I have just cited. The defendants, however, claim immunity upon the authority of the judgment of the Court of Appeal in *Atkinson v. Newcastle & Gateshead Waterworks Co.*, 2 Ex. Div. 441 (1877), and of the decision of the House of Lords in *Cowley v. Newmarket Local Board*, A. C. 345 (1892). So far as regards the first and earlier of these two cases, it is to be noted that (a) the defendants there were not a public body but a private company, so that the Act, in the words of Lord Cairns, ought to be regarded "not as an Act of public and general policy but rather in the nature of a private legislative bargain with a body of undertakers," and both the Lord Chancellor and Cockburn, C. J., lay stress upon this point; and (b) the Act in that case, itself imposed remedies in the form of penalties, a circumstance upon which all the members of the Court of Appeal, questioning the judgment of the Queen's Bench in *Couch v. Steel*, 3 E. & B. 402 (1854), largely based their conclusion. In the case before us, the Public Health Act, 1875, contains no specific provision for the recovery of penalties or for other remedy for the infringement of section 66, and the defendants are not a private company or corporation, but a public authority invested by statute with powers and duties for the benefit of the inhabitants of the district in which that public authority exists.

Cowley v. Newmarket Local Board, *supra*, was a decision of the House of Lords that a local board in respect of its duties in regard to highways under sections 144 and 149 of the Public Health Act, 1875, is not legally liable for mere nonfeasance, according to principles illustrated in old days by *Russell v. Men of Devon*, 2 Term. Rep. 667 (1788), and in modern times by *Gibson v. Preston Corporation*, L. R. 5 Q. B. 218 (1870), and *Municipality of Pictou v. Geldert*, A. C. 524 (1893). That is all the case actually decided. Lord Herschell, it is true, does, in the earlier part of his judgment, express a serious doubt of the soundness of the general proposition that, wherever a statutory duty is created, any person who can show that he has

sustained injury from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed. He quotes with approval certain observations of James, L. J., in *Glossop v. Heston & Isleworth Local Board*, 12 Ch. D. 102, 109, on this point. But Lord Herschell does not found his decision upon this doubt. Like the other noble and learned Lords, he gives judgment for the defendants upon the narrower point of the non-liability of the local board for damage arising from mere omission to repair a highway. "I think it," he concludes, "to say the least, doubtful whether, apart from the reasons to which I am about to refer, the contention that an action lies against the local board for a breach of their statutory duty to repair the highways can be maintained;" and he then proceeds to the discussion of the narrower question, and to give judgment upon that. In regard to the observations of James, L. J., in *Glossop v. Heston & Isleworth Local Board*, *supra*, it is important, I think, to read them in connection with the class of action to which the case belonged. Not only was that action not based, as the Lord Justice points out, upon any act done by the defendants, but not even upon the omission to do any particular or definite act. The alleged neglect was the neglect of the performance of their duty to provide a satisfactory and healthy system of drainage for a whole district; and, as the Lord Justice also points out, the defendants there were under no particular duty cast upon them with reference to any particular individuals. The present case belongs, obviously, to a different class.

Having regard, in the language of Lord Cairns, in *Atkinson v. Newcastle & Gateshead Waterworks Co.*, 2 Ex. D. 441, 46 L. J. Ex. 775, "to the purview of the Legislature in the particular statute and the language which they have there employed"—the absence of provision for any other remedy, and the precise enactment of a definite duty for the protection of the class of persons to which the plaintiffs, as local residents, belong, against the kind of mischief which has in fact occurred, I am not prepared to say that, even if the breach of statute consisted in the omission to set up a denoting plate, an action on the case would not lie against the defaulting urban authority. It is not, however, necessary in the present case to decide this point. Here there has been not merely an omission to put up a plate truly denoting the position of the fire plug A, but the putting up of a plate with untrue directions calculated to mislead, as the circumstances have shown, at just such a time of emergency as that for which the statute, by section 66, intended to provide. There has, it appears to me, been an actual misfeasance, causing damage to the plaintiffs, and in my judgment this appeal must be allowed.

Appeal allowed.

CHRISTENSEN v. OREGON SHORT LINE RAILROAD CO.

[SUPREME COURT OF UTAH, JANUARY 13, 1909.]

35 Utah, 137, 99 Pac. 676.

1. Evidence—Negligence—Res Ipsa Loquitur.

The maxim *res ipsa loquitur* is merely a rule of evidence applicable in negligence actions.

2. Carriers—Passenger—Injury—Slamming of Door.

Negligence on the part of a railroad company cannot be inferred from the mere slamming of the door of a passenger car, thereby crushing the hand of a woman passenger who had rested her hand upon the door jamb while in the act of leaving the car to alight at her station.

3. Carriers—Passenger—Contributory Negligence—Slamming of Door.

It is not negligence *per se* for a woman passenger to place her hand upon the jamb of the door of a railroad passenger car when in the act of alighting at her station, so as to bar a recovery by her for an injury to her hand caused by the slamming of the car door.

Appeal by the defendant from a judgment of the District Court, Second District, rendered in favor of plaintiff in an action brought to recover damages for injuries to her hand caused by the alleged negligent closing of the door of a passenger car. Reversed.

For appellant—P. L. Williams, Geo. H. Smith, John G. Willis, and C. R. Hollingsworth.

For respondent—W. L. Maginnis and S. T. Corn.

COMPLAINT.

Now comes the plaintiff and complains and alleges:

I. That on the 31st day of October, 1907, Anton Christensen was

CASE NOTE.

Injury to Passengers Caused by Closing of Door of Car.

- I. IN GENERAL, 232-233.
- II. PRESUMPTION OF NEGLIGENCE, 233.
- III. SUDDEN STARTING OF TRAIN, 236.
- IV. SUDDEN STOPPING OF CAR OR TRAIN, 236-238.
- V. JERKING OF TRAIN, 238.
- VI. ACT OF EMPLOYEE OF CARRIER, 239.
- VII. PROXIMATE CAUSE OF INJURY, 243.
- VIII. CONTRIBUTORY NEGLIGENCE OF PASSENGER, 244-250.

I. In General.

A carrier of passengers is bound to exercise the greatest care practicable for their safety, and is responsible for any injury due to the defective character of its machinery and cars, the insufficiency of its equipment and want of skill on the part of its agents and employees, providing the passenger injured is without fault on his part. *Lake Erie & W. R. Co. v. Cotton*, 45 Ind. App. 580 (1910); *Hutchinson on Carriers*, § 911.

It is not negligence for the conductor of a train to leave the door of

appointed guardian ad litem by this court for Martha Christensen, minor under the age of twenty-one years.

II. That the Oregon Short Line Railroad Company is, and was at all the times hereinafter mentioned, a corporation organized and existing under and by virtue of the laws of the State of Utah, and engaged in operating a railroad between the City of Ogden and City of Salt Lake, in the said State.

III. That on the 15th day of September, 1907, Martha Christensen was received by said defendant as a passenger upon one of its trains

a car open when the train is in motion; it is a matter of general information that doors of passengers cars are often left open temporarily without exposing passengers to any unusual danger. *Hardwick v. Georgia R. & B. Co.*, 85 Ga. 507, 9 Am. Neg. Cas. 193 (1890).

The facts in *Ham v. Georgia Railroad & Banking Co.*, 97 Ga. 411 (1896), show that the injury sustained was the result of an accident for which the carrier cannot be held liable. It was shown in this case that the plaintiff, at the time of paying his fare, requested the conductor to let him off at a certain crossing and the conductor replied: "Go to the other car and tell Jackson to let you off there." As plaintiff was passing from one car to another, he reached out his hand to catch hold of the car door before it could be closed by some one who had preceded him, but before he could get hold of the door it was slammed back upon his hand causing injury to one of his fingers.

Also, in *Skinner v. Wilmington & W. R. Co.*, 128 N. C. 435 (1901), the injury sustained by a passenger was accidental. In this case it appeared that as the passenger was standing on the platform of the car supporting himself by placing his hand on the door facing, the train was moved forward a little without jerking. At this juncture the door of the coach closed without any one touching it,

badly jamming the passenger's hand. "Nothing short of stationing a man at both doors in each coach at every stopping place to watch the doors to prevent injury to passengers," said the court, "could prevent just such accidents, and such a requirement would be most unreasonable under present conditions."

A passenger who boarded a train at a flag station, where there was no depot or agent, and who was obliged to go forward to the baggage car for the purpose of directing the baggage agent to unload his baggage at a certain point and to pay such agent for the excess thereon, was held in *Creason v. St. Louis, I. M. & S. R. Co.*, 149 Mo. App. 223 (1910), to be entitled to recover damages for an injury to one of his fingers which was caught between the knob and casing of the door when he closed the door of the baggage car on his way to another part of the train. And the fact that the door of the baggage car was constructed in the usual way that doors of such cars are ordinarily constructed, does not relieve the carrier of the charge of negligence, where the method of construction was inherently negligent.

II. Presumption of Negligence.

A presumption of want of ordinary care on the part of an employee of the railroad company, is shown where a passenger, who had passed out of

and duly and regularly paid her fare between the City of Ogden and the Town of Bountiful in the said State.

IV. That the said defendant company so managed, constructed and operated its passenger car in which the said Martha Christensen was riding, that the door thereof would not stand open, and was permitted to swing upon its hinges, and that when the said Martha Christensen undertook to alight from said train at Bountiful, and whilst waiting for other passengers to alight, standing in the aisle, by a sudden jerk of said train she was thrown against the said door, and the same closed upon her fingers, catching the three first fingers of the left hand between the door and the jamb thereof, crushing the same, tearing the finger nails out by the roots, causing her great pain

the coach, after the brakeman had announced the station and pushed back the door on a metal catch, was injured by the door closing without having been touched by any passenger. "It would follow," said the court, "that the plaintiff was injured while taking his departure under conditions established by the carrier and had the right to assume that reasonable precautions had been taken to enable him to leave in safety, and, if the accident happened as described by him, a finding that he exercised ordinary care would have been justified." *Kellogg v. Boston & M. R. Co.*, 210 Mass. 324 (1911).

In an action to recover damages for injuries sustained by a passenger due to the slamming of a car door on his fingers, the conductor testified that there was a catch to hold the door open, that in stopping the car after the door had been fastened back it was not ordinary for the train to jar the door loose, and for it to close, that he did not examine the catch on the day of the accident or the door as it was pushed open, and that it was his duty to see that everything was in proper order. The engineer testified that when he stopped the car it was not the rule for the door of the car to slam shut. A passenger testified, in substance, that at the time of the al-

leged injury the car lurched forward and plaintiff put up his hand to steady himself, and immediately the door closed upon his fingers. The court held that an instruction that "there was no evidence in the case of any defect in the fastening or catch provided for holding the door open, nor any negligence on the part of the brakeman in opening the door or in adjusting the fastenings, and no evidence on which you can find that the defendant was at fault in respect to the opening or closing of the door," was erroneous. The court said that the law imposes upon the carrier the burden of removing the presumption of negligence which arises from the happening of an accident resulting in injury to a passenger. *Lake Erie & W. R. Co. v. Cotton*, 45 Ind. App. 530 (1910).

Proof of the existence of the relation of carrier and passenger and proof of an injury, do not, in every case, make a *prima facie* showing of negligence against the carrier, when the specific acts described are the gist of the action, but the plaintiff must prove his allegations. *Chicago Union T. Co. v. Leonard*, 126 Ill. App. 189 (1906). In this case the plaintiff averred that while he was standing on the front platform of one of defendant's street cars in the exercise of due care and

and suffering and disfiguring her hand permanently and permanently interfering with the use thereof, all to her damage in the sum of One Thousand (\$1,000) Dollars, for which sum plaintiff asks judgment.

V. Plaintiff says that said accident was caused by reason of the said door not being held firmly in its place and also by reason of the careless and negligent causing of said train to jerk whilst the passengers were alighting therefrom.

Wherefore, plaintiff prays judgment against the said defendant in the sum of One Thousand (\$1,000) Dollars, and costs.

ANSWER.

The defendant, answering the complaint filed herein, says:

1. That it admits the allegations contained in the second paragraph of the complaint.

diligence, the servants of the defendant carelessly started said car forward, causing plaintiff's body to sway backward toward the door, and that defendant's servants, while knowing the position in which plaintiff was standing, carelessly, negligently and violently pulled the door of the car shut, thereby catching plaintiff's arm between the door of the car and the facing of the door, in consequence of which his arm was seriously injured. The court said that mere proof of the accident did not place upon the carrier the obligation to disprove the specific acts of negligence which the plaintiff had charged, but that the plaintiff must prove the allegations of his petition.

The fact that a passenger in a railroad carriage is injured by having his finger crushed by the closing of the carriage door by the station master after another passenger had alighted at a station, is not evidence of negligence on the part of the railroad company. *Drury v. North Eastern R. Co.*, 2 K. B. 322, 70 L. J. K. B. 830, 84 Law T. 658 (1901).

In *Cornette v. Balt. & Ohio R. Co.*, 195 Fed. 59 (1912), it appeared that as the plaintiff was about to leave the

passenger car in which she was riding, the door swung and caught her hand between it and the door frame. No act of commission or omission on the part of the carrier was shown, and the plaintiff gave no evidence as to what caused the door to swing. The court quoted the language of the court below, as follows: "The plaintiff's case must fail because there is no evidence showing the cause of the accident. It cannot be inferred from the circumstances of the accident and outside of this there is no evidence."

Any presumption of negligence caused by the sudden closing of a car door, which had been fastened back against the toilet room, thereby striking the hand of a passenger who was standing upon the platform, with his hand against the casing of the door, awaiting an opportunity to enter the toilet room, is overcome by uncontradicted proof that the catch provided for the car door was in good repair and that the train was not operated at a dangerous rate of speed; and, therefore, a verdict was properly directed in favor of the defendant. *Goss v. Northern Pac. R. Co.*, 48 Or. 439, 87 Pac. 149 (1906).

II. That it has no knowledge or information respecting any of the allegations contained in the third paragraph of said complaint, for which reason it denies each and every allegation in said paragraph contained.

III. It denies each and every allegation contained in the fourth and fifth paragraphs of said complaint.

IV. Defendant, further answering said complaint, and as a further defense to the cause of action attempted to be set forth therein, says: That whatever injury was received by the therein named ward,

III. Sudden Starting of Train.

A railroad company is bound to stop its trains a sufficient length of time to permit passengers to board the same in safety and without danger of injury caused by the slamming of the doors of the coaches. *Poole v. Georgia R. & B. Co.*, 89 Ga. 320 (1892). In this case the plaintiff attempted to board the train, but on account of its crowded condition, the large number of passengers alighting, and the short space of time given passengers to enter the cars, he was forced to board the train as it was starting, and just as he was going through the door of the car the train gave a sudden jolt and he was obliged to catch hold of the side of the door for support. The sudden starting of the car caused the door, which was of heavy material and not propped back by the usual apparatus attached to the floor of cars to keep doors from closing, to shut with considerable force, badly crushing two of plaintiff's fingers and painfully injuring his entire hand.

In *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind. App. 244, 3 Am. Neg. Cas. 1 (1891), it was held that a railroad company was liable for injuries to the fingers of a woman passenger caused by the violent closing of the car door when the train was negligently started with a violent jerk as she stood upon the platform, with a child in her arms, at the direc-

tion of the employees or servants of the train to remain there until the train had come to a stop. It was claimed by the defendant that the plaintiff failed in her duty when she went upon the platform of the car with her infant child in her arms, and permitted her hand or fingers to be in a position where they were liable to be injured if the door closed upon them. In commenting upon this contention, the court said that it does not appear that the plaintiff voluntarily and independent of the sudden motion of the train so placed her hand, and even if it did so appear, we are not prepared to say, as a matter of law, that it would be negligence on her part, under the circumstances disclosed by the plaintiff, to steady or support herself by taking hold of the door frame; she was entitled to rely on the judgment of those in charge of the train that she would not be exposed to any risk which a reasonably prudent person would not assume. The negligence complained of in this case as the proximate cause of plaintiff's injury, was the violent starting of the train which caused the door to close, and not the failure of the carrier to fasten it open securely.

IV. Sudden Stopping of Car or Train.

If the injury caused by the closing of a door was purely accidental, the carrier cannot be held liable. *Hardwick v. Georgia R. & B. Co.*, 85 Ga. 507, 9 Am. Neg. Cas. 193 (1890). In

Martha Christensen, and whatever damage accrued to her therefrom, were each the results of her negligent acts and conduct in placing her hand in such position with reference to the therein mentioned door of the car, as to admit of said injury; and, furthermore, in taking up and maintaining the position occupied by her in said car at the time and place of the reception of said injury, and contrary to the express rules of defendant forbidding same.

Wherefore, defendant prays this cause to be dismissed at plaintiff's costs.

FRICK, J. This is an action for personal injuries alleged to have

this case the facts show that the plaintiff, in company with his minor son, boarded one of defendant's night passenger trains and requested the conductor, who received their fare, to stop the train at a certain place; but the train ran past that station at its usual speed, making no effort to stop, although that station was a usual stopping place. Not wishing to be carried by in this manner, especially in the night, plaintiff's son went forward in the train to search for the conductor to request him to stop the train. About this time the conductor passed plaintiff from behind, going through the rear door of the car and leaving the same open. As the conductor passed, the plaintiff asked him why he did not stop the train to permit the son to get off as he had been requested; receiving no reply, plaintiff arose and went to the open door in search of his son. Just as he reached the door the conductor, without any notification, seized a bell rope and gave it a strong jerk causing the train to come to a sudden stop. Plaintiff, who was standing in the aisle, naturally put his left hand against the facing of the door for support, and a part of his forefinger was caught between the door and the facing by the closing of the door due to the sudden stopping of the train. The court said: "Leaving the door of

the car open whilst the train was in motion was not negligence; for, as matter of general information, it is known to all travelers that the doors of passenger cars can be left open temporarily, without exposing passengers to unusual danger. Nor was it negligence for the conductor to stop the train suddenly in order to repair, as speedily as possible, the error he had committed in passing the station without stopping. Although the plaintiff's injuries resulted from the stopping of the train and the fact that the door was open, yet it seems to have been a pure accident; for no such thing would have happened if the plaintiff had not chanced at the moment to be standing near the door, instead of occupying one of the seats in the car. His exposed position was not known to the conductor, or at least it was not alleged to have been known. Taking the declaration as true, the injury was an accident, and the courts, in the present state of the law, must recognize accidents as such, even when they occur on railroads." See, also, *Hutchinson on Carriers*, § 927.

A street car company cannot be held liable for an injury to a passenger who left his seat before the car stopped, preparatory to alighting, and placing his hand on the door jamb was injured by the slamming of the door

been caused by the negligence of appellant. The action was prosecuted by respondent as guardian ad litem for the benefit of his daughter, a minor. After alleging the corporate capacity of appellant, and that the appellant on the 15th day of September, 1907, did receive the minor aforesaid as a passenger for hire, the complaint states the following as constituting negligence on the part of appellant, namely: "That the said defendant company so managed, constructed, and operated its passenger car in which the said Martha Christensen was riding that the door thereof would stand open, and was permitted to swing upon its hinges and that when the said Martha Christensen undertook to alight from said train at Bountiful, and while awaiting for other passengers to alight, standing in the aisle, by a sudden jerk of said train, she was thrown against the said door, and the same closed upon her fingers, catching the three first fingers of the left

by the sudden stopping of the car. It did not appear in this case that there was any unusual jolting in the stopping of the car. *Muller v. Maubhat* R. Co. 48 Misc. 524, 96 N. Y. Supp. 270 (1905).

The negligence alleged in *Madden v. Missouri Pac. R. Co.*, 50 Mo. App. 666, 4 Am. Neg. Cas. 424 (1892), consisted in carelessly and negligently putting in motion the train on which plaintiff was riding, after the signal to stop had been given and she had gone to the platform for the purpose of alighting at her station, and then suddenly bringing the train to a stop, thereby causing her to be thrown against the frame of the door so that her hand was hurt by the sudden closing of the door. These facts, the court held, created a *prima facie* case of negligence on the part of the carrier in failing to give the plaintiff sufficient opportunity to alight.

In an action for injuries to a passenger caused by the door of a passenger car slamming against his foot when the car was brought to a sudden stop, the grounds of negligence alleged were: "(1) that defendant failed to fasten back said door so as to cause the same safely to stand

open; (2) that the catch in use for the purpose of holding the door open was old, worn, and out of repair; (3) that the train upon which plaintiff was riding was carelessly and suddenly stopped with great force, and the door thrown from its fastening." The court held that if the proof showed some degree of negligence on the part of the carrier with reference to any one of the alleged negligent acts, the plaintiff was entitled to recover for the injury he sustained. *Texas & P. R. Co. v. Leakey*, 39 Tex. Civ. App. 594 (1905).

But, a presumption of negligence does not arise from proof which shows, that just as a train came to a stop, it gave a lurch to one side, thereby causing the door of a car to close upon the fingers of a passenger who stood in the open door way, in absence of proof that the motion of the car was more than the usual motion incident to stopping. *Graf v. West Jersey & S. R. Co.*, (N. J. L.), 62 Atl. 333 (1905).

V. Jerking of Train.

The sufficiency or extent to which a car door was fastened back by the conductor, is immaterial in a case in

hand between the door and the jamb thereof, crushing the same." It is further alleged: "That said accident was caused by reason of the said door not being held firmly on its place, and also by reason of the careless and negligent causing of said train to jerk whilst the passengers were alighting therefrom." It will be observed that no negligence is directly charged except to "jerk" the train. No defect is alleged in any appliance or instrumentality, nor is it alleged that the door was left open negligently, or that the appellant was negligent because the door was "not being held firmly in its place." The negligence, therefore, if any, must be inferred from the facts stated, except that the appellant was negligent in causing the train to "jerk," as stated above.

which the sudden jerking of the train backward and forward caused the door to slam shut against the hand of a passenger who was holding to the casing to prevent himself from being thrown from the train. *McCurrie v. Southern Pac. R. Co.*, 122 Cal. 558, 5 Am. Neg. Rep. 117, 55 Pac. 324 (1898).

Evidence which showed that plaintiff was injured at a regular station at which the train on which he was riding had stopped, owing to the sudden jerking of the train backward and forward, in consequence of which he lost his balance and was compelled to steady himself by seizing hold of the casing of the car door, when the door swung shut and injured his hand, was held in *McCurrie v. Southern Pac. R. Co.*, 122 Cal. 558, 5 Am. Neg. Rep. 117, 55 Pac. 324 (1898), to be sufficient to authorize a jury to find a verdict in favor of the plaintiff, and therefore error for the court to direct a verdict in favor of the defendant.

VI. Act of Employee of Carrier.

A recovery was warranted by proof that plaintiff, who was a passenger on defendant's train, left the train before reaching his destination to speak to a few friends at a station where the train had stopped, and in returning to the car met the porter coming out of the door, and as he stepped aside to

allow the porter to pass, put his hand on the door-facing or jamb, and as he did so the porter slammed the door shut with such force as to crush two of plaintiff's fingers. *Rushin v. Central of Ga. R. Co.*, 123 Ga. 726 (1907).

A passenger who is compelled to ride upon the platform of a baggage car because there was no other vacant space for him to occupy, is entitled to recover for injuries to his hand caused by the unexpected closing, by an employee of the train, of the door of the car, against which plaintiff had placed his hand to hold himself in position, and to prevent himself from being thrown from the car by the jolting of the train. *Trumbull v. Donahue*, 18 Colo. App. 460, 14 Am. Neg. Rep. 253, 72 Pac. 684 (1903).

In *McGlynn v. Brooklyn Crosstown R. Co.*, 6 N. Y. St. Rep. 51 (1896), sufficient time was not given a passenger to alight from a street car. In this case it appeared that the plaintiff, who was a woman, gave a signal for the car to stop and that it did not stop in response thereto, and as she was about to alight from the car her finger was entirely cut off by the sudden closing of the door of the car, which fitted into grooves termed "a rabbit," by the act of the driver who operated the door from his position in

The evidence upon the part of the respondent to establish the foregoing allegations is, in substance, as follows: Martha Christensen, the injured minor, as appears from the printed abstract, testified: "My name is Martha Christensen, and I am 13 years old. About the middle of last September, I went with my father from Ogden to Woods Cross. Father bought a ticket for me. I put my left hand on the door frame and the door came shut on it. I was going out of the car. Father went out of the car ahead of me, and was out on the platform. The car had stopped before I got up to go out. I came out and was outside on the platform of the car. I just came out and

front, in closing the same before she had time to alight.

No duty is imposed upon the servant of a railroad company to give warning of the shutting of the door of a railroad carriage, to passengers who are not in the act of getting in or out. *Drury v. North Eastern R. Co.*, 2 K. B. 322, 70 L. J. K. B. 830, 84 Law T. 658 (1901); *Benson v. Furness Ry.*, 88 Law T. 268 (1903).

It is not the duty of a trainman to notice the position of a passenger's hand on the frame of a car door, so as to charge the carrier with liability for injuries sustained by such passenger by the act of the brakeman in closing the door against the passenger's hand; a trainman has the right to presume that the passenger will take proper care of himself. But if the trainman actually sees the position of a passenger's hand and then closes the door regardless of consequences, it is held that even the negligence of the passenger in standing in the position she occupied will not exonerate the carrier from liability for the injury. *Texas & P. R. Co. v. Overall*, 82 Tex. 247, 10 Am. Neg. Cas. 230 (1891).

In an action against a railroad company to recover damages by a passenger who had gone to the platform believing that the train had reached his station, and who was injured by the act of the porter in pushing him to

one side and violently closing the door upon three of his fingers, an instruction to the jury that if plaintiff was standing on the platform preparatory to alighting, leaning against the door of the car, and the porter, at the time of opening the door, did not see him and could not have seen him by the use of reasonable diligence, the defendant was not liable, was erroneous as to the degree of care, since the porter was negligent in opening the door at the time only if he knew or had reason to anticipate that the passenger was leaning against it. *St. Louis S. W. R. Co. v. Ball*, 28 Tex. Civ. App. 287 (1902).

Where it does not appear that a guard on a subway train knew the position of a passenger's hand, and in absence of proof showing that it was common for passengers to place their hands on car doors for support, it was held in *Maillefert v. Interborough R. T. Co.*, 50 Misc. 160, 98 N. Y. Supp. 207 (1906), not to be negligence for the guard of a car into which passengers were pouring through a door open only two-thirds of its width, to open it to its full width, thereby crushing the hand of a passenger which the latter had placed against the casing of the door to protect himself from the crowd.

It is not negligence for a guard upon the platform of a station of an ele-

then put my hand on the door frame. I was on the platform outside. I don't know what I put my hand on the door frame for. I can't describe just what I was doing, and how I happened to put my hand on the door frame, and the door came shut on it. I was going out of the door frame, and then the door slammed shut on it." On cross-examination she said: "I noticed the door was slamming when I was sitting on the car, and that was before I got up to go out. It was just about soon after I got on the train that I noticed the door. * * * That was soon after I got on the train at Ogden, and it continued to slam backwards and forwards."

The father, after stating that he and Martha on September 15, 1907, were passengers in appellant's train, in part testified: "The accident happened through the door shutting on her fingers as she was getting off. The first I knew of it (I was already down on the platform of the station at Woods Cross) was when she came down carrying and holding her hand. When I got off the train, it had stopped. * * * I noticed the door on the train. It was on the swing, and every little while when the train slacked up it would go shut with a crash. I have no knowledge as to what caused it to go shut at the time it crushed her hand. I didn't see that. I have frequently observed passenger cars and the doors to them, most of them which I have seen have a catch. When the train is stopped at a station and the passengers are getting off the car, the door is fastened back with a catch. * * * I do not know just what kind of a catch it is. It is a

vated railway to begin to open the sliding side door of a car of an incoming train before the train has come to a full stop, when he had no reason to anticipate that a passenger would put his hand on the casing of the door to steady himself as the car came to a somewhat sudden stop. "To save time for the multitudes of traveling people to whom time is valuable," said the court, "it is necessary to have the doors ready to permit exit as soon as the passengers safely can begin to pass out. A little time must be consumed in unfastening and opening the door. To hold that the guard outside shall not be permitted to begin the process until the cars come to a complete standstill, would impose an unnecessary and unreasonable restriction,

whose effect would delay passengers and prolong the running time of the trains. Ordinarily there is no reason to anticipate danger from beginning to get ready the places of exit while the train is in its last part of its movement before coming to a stop. Passengers are not expected to have their fingers in such a position as to be in danger of the opening of the doors at such times." *Hannon v. Boston El. R. Co.*, 182 Mass. 425, 14 Am. Neg. Rep. 331 (1903).

If a conductor saw the position of a passenger's hand resting against the casing of the door of a closet in a passenger coach, when he quickly opened and closed the closet door, the carrier is liable to the passenger in damages for an injury to his fingers which had

clasp that goes back. A clasp comes back to that hook to hold it, with a spring on it. * * * It is automatic, and you just push it back and it catches. It is for the purpose of holding it open." On cross-examination the witness said: "The door was open back when I got off. I couldn't tell particularly when was the last time I saw it swing to with the noise. It was before I got to Woods Cross, but I couldn't tell you just where it was."

The conductor testified: "I first learned of it (the accident) when she stepped off the station platform down on the ground. I made an examination of the door of the car. It was O. S. L. 151, I think. I made an examination of the fastenings provided for holding the door open. They were in perfect condition. The door held when it was pushed back. I simply looked to see what was the cause of the door slamming. I got up to see after the train started * * * The fastening was all right on the door." He further said, on cross-examination, that he made the examination after the train had left the station; that he could not say whether the door was clamped back at the time the girl got off the train; that both doors of the car were open all the way from Ogden to Salt Lake City; that they were open because the weather was warm.

The foregoing substantially is all the evidence adduced at the trial. At the close of the evidence, the appellant requested the court to direct the jury to find for it. The court refused the request, and submitted the case to the jury upon the evidence. The jury rendered a verdict in favor of respondent, upon which the court entered judgment, and hence this appeal.

slipped into the crack when the door was open and crushed when the door was closed by the act of the conductor. "We cannot say, as a matter of judicial determination," said the court, "that a conductor exercising the high degree of care, watchfulness and diligence required by law of carriers of passengers, would not have taken such precautions as would have prevented the injury, or that, as to the carrier the injury was the result of mere accident." *Romine v. Evansville & T. H. R. Co.*, 24 Ind. App. 230, 7 Am. Neg. Rep. 227 (1900).

The brakeman on an elevated train who, during the trip, had been so seated

that he must have seen that the plaintiff, who had arisen and gone to the door of the car, wished to alight at a station, was negligent, in letting go the car door which he had opened for passengers to pass out, in absence of suitable appliances to hold the door from shutting when the train stopped, thereby allowing it to slam against her hand which she had placed on the casing of the door to steady herself on account of the jarring of the car. The court said: "Either a door should have been provided which, under ordinary circumstances, would remain stationary after having been opened by the brakeman to permit the egress of

The appellant excepted to the refusal of the court to direct a verdict, and now urges that the court erred in submitting the case to the jury upon the evidence adduced at the trial. There certainly is no evidence whatever to sustain the allegation of negligence with regard to the moving or jerking of the train. This, therefore, is eliminated from the case. Is there any evidence of negligence in any other respect? It certainly cannot be contended that there is any direct evidence that any appliance or instrumentality in use by appellant was defective, or that the injury was caused by any such defect. Is there any indirect or circumstantial evidence from which such negligence may be inferred, or are the facts and circumstances, as disclosed by the evidence, such as bring the case within the maxim of *res ipsa loquitur*? In other words, are the circumstances surrounding the accident in question such that negligence upon the part of appellant may be assumed or inferred from the mere happening of the accident? Appellant contends that there is no evidence of negligence, either direct or circumstantial, and that the undisputed facts, as they appear from the evidence, do not bring the case within the maxim aforesaid. Upon the other hand, respondent insists that the facts and circumstances are such as bring the case within the maxim, and that all that was incumbent upon him to prove to entitle him to a verdict at the hands of the jury was proved at the trial. We have very recently had occasion to discuss and apply the maxim of *res ipsa loquitur* as between carrier and passenger in the cases of *Dearden v. San Pedro L. A. & S. L. R. Co.*, 33 Utah, 147, 93 Pac. 271, and *Paul v. Salt Lake City R. Co.*, 34 Utah, 1, 95 Pac. 363. The maxim "*res*

passengers, or the trainman should have exercised due care to prevent any injury to passengers by a door which he had opened to offer them an exit, and which was under his immediate control at the time." *Colwell v. Manhattan R. Co.*, 57 Hun. 452, 5 Am. Neg. Cas. 511, 10 N. Y. Supp. 636 (1890).

It is a question for the jury, in an action against a carrier to recover for injuries to plaintiff's hand by the closing of a door, whether the conductor in closing the door before seeing that plaintiff had cleared it, was in the exercise of due care. *Louisville & N. R. Co. v. Mulder*, 149 Ala. 676 (1906).

In *Murphy v. Atlanta & W. P. R. Co.*,

89 Ga. 832 (1891), a judgment of nonsuit was rendered against the plaintiff whose fingers were crushed, while he was standing within a crowded car with his left hand resting on the door of the water closet, as the result of a sudden opening and closing of the door by a workman who approached him from behind, on the ground that the injury was the result of an accident and not due to any negligence on the part of the railroad company or its servants.

VII. Proximate Cause of Injury.

The act of a guard on a subway train in opening to its full width, by

ipsa loquitur" is merely a rule of evidence applicable in a certain class of cases, and is generally applied in cases of injuries to passengers.

The maxim, when applicable to the facts and circumstances of a particular case, is not intended to, and does not, dispense with establishing negligence. In all cases when negligence is the gist of the action, the negligence must be proved, but in case of an injury to a passenger he is only required to prove that the injury was occasioned by a collision, derailing or upsetting of coaches, breaking of machinery, or appliances, or things of that character, or through some act or acts of the servants operating the machinery or appliances, or in the management of the instrumentalities or the means used in the business over which the carrier has control, and for the conduct and management of which he is responsible. *Paul v. Salt Lake City Ry. Co.*, 30 Utah, 49, 83 Pac. 563. The law imposes the duty upon the carrier of exercising the utmost care to protect his passengers against accidents; and in case an accident occurs, the inference arises that the carrier has not exercised that high degree of care which the law imposes. If such care had been exercised, the inference is that the accident would have been avoided; that is, if the degree of care which the law imposes had been exercised in the construction and maintenance of the track and in the selection and inspection of machinery, instru-

the means of a lever, a sliding door which was open only two-thirds of its width when the train stopped at a station to take on passengers, was not the proximate cause of an injury to a passenger who, being crowded by those in the rear, put his hand on the casing of the door and as a result was injured by having his finger crushed when the door was opened to its full width. *Maillefert v. Interborough R. T. Co.*, 50 Misc. 160, 98 N. Y. Supp. 207 (1906).

VIII. Contributory Negligence of Passenger.

It is not contributory negligence, as matter of law, for a passenger to leave his seat when the train had stopped at a regular station, and to attempt to go upon the platform of the car for the purpose of meeting his son who

was at the station to see him, barring a recovery for an injury to his hand which was against the casing of the door for the purpose of steadying himself as the train was suddenly jerked backward and forward, in which position it was crushed by the sudden closing of the door. *McCurrie v. Southern Pac. R. Co.*, 122 Cal. 558, 5 Am. Neg. Rep. 117, 55 Pac. 324 (1898).

It was held in *Kellogg v. Boston & M. R. Co.*, 210 Mass. 324 (1911), that a passenger was in the exercise of ordinary care by passing out of the coach after the brakeman had announced the station and pushed back the door of the car on a metal catch, and is, therefore, entitled to recover for injuries to his hand caused by the door closing upon it without having been touched by any passenger.

It is not an act of negligence for a

mentalities, and appliances of all kinds, and in handling them, by the servants, then it may be inferred that the accident would not have occurred. But this inference in its last analysis amounts simply to one way of proving or establishing negligence. It means, too, just what the maxim implies. "The thing speaks for itself." That is, an accident has happened, therefore it may be inferred that by the exercise of the degree of care required it could have been avoided. The only difference between an ordinary case of negligence arising between master and servant, or between those sustaining other relations, and one arising between a carrier and passenger, consists in the manner of establishing the negligence constituting the gist of the action. In the first instance referred to, the happening of the accident causing the injury ordinarily is no proof of negligence; while, as between carrier and passenger, when arising as above indicated, the happening of the accident may be, and usually is, *prima facie* proof of negligence. It must not be assumed, however, as it sometimes is, that the maxim of *res ipsa loquitur* is limited to cases arising between carrier and passenger. This is well illustrated by the New York Court of Appeals in the case of *Griffen v. Manice*, 166 N. Y. 188, 9 Am. Neg. Rep. 336, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, in which case there is a learned and interesting discussion with regard to the application and legal effect of the maxim. Nor should it be assumed that the maxim is applicable under all circumstances as between carrier and

woman passenger on an elevated train to leave her seat and go toward the door of the car, which at the time was held open by one of the trainmen as the train approached her station, but which the trainman permitted to slam shut thereby injuring her hand which she had placed on the casing of the door to steady herself on account of the jarring of the car. *Colwell v. Manhattan R. Co.*, 57 Hun (N. Y.) 452, 5 Am. Neg. Cas. 511, 10 N. Y. Supp. 636 (1890).

Contributory negligence was not shown, thereby defeating the right of a woman passenger to recover for an injury to her hand by the closing of a car door, caused by the negligent jerking of the train after she had gone to the platform to alight at her station, by proof that she had frequently taken

passage on the train in question, which was an accommodation train, was familiar with its operation, that, when the train started after the first stop just before reaching her station, she could have taken a seat without inconvenience to herself and waited for the train to stop again, that she saw the brakeman pull the signal cord, and knew that the door was open and likely to swing to and fro. *Madden v. Missouri Pac. R. Co.*, 50 Mo. App. 666, 4 Am. Neg. Cas. 424 (1892).

A passenger whose hand was jammed by the closing of a car door upon it, was held in *Louisville & N. R. Co. v. Mulder*, 149 Ala. 676 (1906), not to be guilty of contributory negligence, as matter of law, in going upon the platform of one of the cars, when the train was in motion, in violation of the

passenger. There may be, and are, accidents which cause injuries to passengers where the maxim cannot be applied. The conditions under which the maxim does or does not apply are illustrated and applied in the following, among other cases: *Herstine v. Leigh Valley Ry. Co.*, 151 Pa. 244, 10 Am. Neg. Cas. 214, 25 Atl. 104; *Graeff v. Phila. & Reading Ry. Co.*, 161 Pa. 230, 6 Am. Neg. Cas. 376, 28 Atl. 1107, 23 L. R. A. 606, 41 Am. St. Rep. 885; *Morris v. N. Y. C. & H. R. R. Co.*, 106 N. Y. 678, 9 Am. Neg. Cas. 664, 13 N. E. 455; *Griffen v. Manice*, 166 N. Y. 188, 9 Am. Neg. Rep. 336, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; *Penn. R. Co. v. McKinney*, 124 Pa. 462, 10 Am. Neg. Cas. 164, 17 Atl. 14, 2 L. R. A. 820, 10 Am. St. Rep. 601; *Goss v. N. P. Ry. Co.*, 48 Ore. 439, 87 Pac. 149; *Paul v. Salt Lake City Ry. Co.*, 30 Utah, 41, 83 Pac. 563; *Dearden v. San Pedro Ry. Co.*, 33 Utah, 147, 93 Pac. 271; *Paul v. Salt Lake Ry. Co.*, 34 Utah, 1, 95 Pac. 363.

Referring now to the evidence in this case, does it show any negligence on the part of appellant? As we have seen, there was no negligence in the management of the train. It stood still before the accident occurred, and remained so until after it had occurred. There is no evidence that any act of an employee in any way caused or contributed to the happening of the accident. There is no evidence of any defect in any appliance or instrumentality used by appellant, unless such defect may be inferred from the fact that a door closed

rules of the carrier forbidding passengers to be upon the platform, so as to bar a recovery for an injury to his hand caused by the act of the conductor in closing the door upon it as he was attempting to enter the car to be seated after he had been stopped by the conductor who demanded his ticket.

A passenger on an electric car who left his seat to alight from the car, but on finding that his street had not yet been reached, stood in the doorway of the car supporting himself by placing his hand against the jamb of the door with his thumb in the slot in which the door slides, is not guilty of contributory negligence, barring his right to recover for injuries sustained by the act of the conductor, who stood upon the platform facing the plain-

tiff with his eyes not more than 12 inches from plaintiff's hand, in slamming the door shut, thereby injuring plaintiff's thumb. The street car company contended that there was no need for the passenger to put his thumb into the slot as he did, but the court said that it is plain that a passenger in the exercise of due care may grasp something to steady himself against being thrown back and forth by the sudden starting of the car, and that the jury were warranted in finding that the passenger injured had reason to suppose that the car might be started suddenly, and that there was nothing else which gave him means of support, except by grasping the slot. *Carroll v. Boston & N. St. R. Co.*, 186 Mass 97 16 Am. Neg. Rep. 376 (1904).

It is a question for the jury as to

while the passenger was in the act of alighting from the train after passing through the open door. But can it be inferred that there is some defect in an ordinary door simply because it swings upon its hinges, and closes unexpectedly? If we bear in mind that a door swings upon hinges, that it is intended to open and close for the use of passengers to enter and leave the car, how can any inference of negligence arise merely because a door closes at a time when it was not expected to do so by a particular person, and for some unexplained reason? Can it be said that, because there is some evidence that car doors are usually provided with a catch to hold the door open while passengers are passing in or out of the car at stations, and that because this door was not held open, therefore the catch was defective? Before this inference can prevail, it seems to us it should be made to appear that the door was in fact placed back so as to come in contact with the catch, and that it was not held in place by it. If, under such circumstances, the catch did not hold, it might possibly be inferred that the catch was defective. Can it be assumed that the appellant was negligent in not seeing that the door was placed back sufficiently to interlock with the catch? This, it seems, would be wholly unreasonable. Car doors, as a matter of common, if not universal, knowledge, are not entirely under the control of the employees of the railroad company, but are used at pleasure by the passengers for the purpose of passing in and out of the car, or

the negligence of a passenger in leaving his seat and proceeding to the exit of the car, while the train was running slowly as it neared the stopping place where he desired to alight, so as to bar a recovery by him for an injury to his hand caused by the car door slamming against it as he threw out his hand to steady himself when the train came to a final stop. *Lake Erie & W. R. Co. v. Cotton*, 45 Ind. App. 580 (1910).

"Taking into consideration the mode of construction of the commodious and convenient American passenger car, and the common known habits of the public in our railway carriages," said the court in *Romine v. Evansville & T. H. R. Co.*, 24 Ind. App. 230, 7 Am. Neg. Rep. 227 (1900), it could not be held that a passenger was guilty of negli-

gence *per se* in standing inside the car looking through the window of the rear door with his hand resting against the casing of the closet door, so as to bar a recovery by him for injury to his fingers caused by the act of a conductor in opening and closing the closet door quickly in consequence of which his fingers which had slipped into the crack of the door when the same was open were crushed by the door when it was closed by the conductor.

In determining the question of contributory negligence, in an action for injuries to a passenger by having a door slammed on his hand, the nature of the train as a mixed freight and passenger train and its mode of operation must be considered. *Texas Mexican R. Co. v. Wilson* (Tex. Civ. App.), 136 S. W. 565 (1911). The negli-

in passing from car to car. If, therefore, it be said that it is the duty of the railroad company to see that every door is fastened back when it is opened, it must follow that the company must station a servant at every door to attend to the fastening of it in case the passing passenger either leaves it unlatched in closing it or unfastened to the back catch when opening it. To merely have a servant fasten the door, and then leave it, would be of little, if any use, since any passenger might unfasten it the next moment. If the law does not impose the duty upon the railroad company to keep a constant watch upon the car doors, then no negligence is shown in this case. There is no evidence that the door was not fastened back at the proper time, unless the fact that it closed raises a presumption that it was not so fastened. If such a presumption arises at all, it cannot prevail as against the known fact that both ingoing and outgoing passengers interfere with car doors. There is evidence that there were other passengers on the car platform, but there is no evidence whatever to show that the door was not caused to be closed by some passenger or some one in the car or from some natural cause. The movement of the train did not cause it to close because the train did not move. It is not shown that any act of the appellant or of any servant caused the door to close. Therefore the real cause is left to mere conjecture. When it is remembered that doors are made to swing upon their hinges for the purpose of opening and closing at any time, then the closing of a door is such a usual and natural occur-

gence alleged in this case was that the carrier caused the coach in which the plaintiff was riding, to be violently jerked and bumped about backward and forward in such a manner as to cause him to reel and stumble, and the door of the car to be slammed against his left hand, in consequence of which his third finger was badly bruised.

A passenger was held to be guilty of negligence in *Texas & Pac. R. Co. v. Overall*, 82 Tex. 247, 10 Am. Neg. Cas. 280 (1891), in standing by the doorway of a car with his hand resting upon the door frame against which the door shutter closed, and who, while in that position, suffered injury to his finger by the closing of the shutter by a brakeman or by a woman passenger,

the evidence being disputed as to which one shut the door.

In an action against a railroad company for personal injuries sustained by a woman passenger, contributory negligence, defeating her right to recover for injuries sustained by the car door closing upon her fingers, was shown by proof that as the train approached the station at which she desired to alight to take another train, she started for the platform to be ready to alight before the trainman had called out the station, that the door of the car had been left open by one of the employees of the train apparently for ventilation, that as the plaintiff stepped upon the threshold of the car there was an unusual jolt, and to protect herself from falling she

rence that no negligence can be inferred from the simple fact that the occurrence took place. But, if an inference would arise that the back catch was defective because the door closed, this inference was entirely overcome by the positive testimony of the conductor, who testified that the catch provided to hold the door back when open was in perfect order and held the door in place when it was forced back into the catch. There is no evidence disputing this testimony. The rule, therefore, applies which is well and tersely stated in a similar case by the Supreme Court of Oregon in the syllabus of that case in the following language: "Where the evidence of negligence is entirely inferential and the testimony for the defendant is clear and undisputed to the effect that there was no negligence, the plaintiff's case is overcome as a matter of law, and it becomes the duty of the judge to take the case from the jury." *Goss v. N. P. Ry. Co.*, *supra*, [48 Ore. 439, 87 Pac. 149].

Taking the whole evidence in this case, we are unable to see how respondent can sustain the judgment in the light of sound reason and correct principles. But the decisions need not be rested upon reason and principle alone. There is direct, and what we consider good, authority to sustain our conclusions.

In the case of *Skinner v. W. & W. R. Co.*, 128 N. C. 435, 39 S. E. 65, the facts were almost identical with those in this case. The only difference between that case and this is that there the train was moved, while in this case it stood still. The court in the course of the

placed her hand upon the jamb of the door, and that as she stepped upon the platform the door swung closed and seriously jammed her hand. The plaintiff knew that the door was open and there was no evidence that it was fastened back or that she believed that the door was so fastened. The court said: "It is generally known that the catches on car doors are not intended to hold them securely against being shut, but only to guard against their being lightly or easily moved. This is all that she would have a right to infer even if she had believed or known that the door was held by a catch. * * * The jolt of the car was described as an unusual one; but it does not appear to have been due to any defect in the track or car, or in

any carelessness in the running of the train. * * * Nor could it be found that the defendant was careless in the management of the door. Apparently it had been left open by reason of the closeness of the air in the car; and the defendant was not bound to keep it from closing at a time when it was not called upon to anticipate that passengers would be standing upon the threshold of the platform. Nor would it be inferred from the mere closing of the door either that there was a defective fastening or that there had been negligence in putting the door on the catch. * * * It is not a case to which the doctrine of *res ipsa loquitur* can be applied." *Weinschenck v. New York, N. H. & H. R. Co.*, 190 Mass. 250 (1906).

opinion at page 437 of 128 N. C., at page 65 of 39 S. E., disposes of the alleged negligence as follows: "We cannot see the least negligence in the management of the defendant's train, and there was no testimony of any fault in the condition or construction of the coach door. The occasion was purely an accident. Nothing short of stationing a man at both doors in each coach at every stopping place to watch the doors to prevent an injury to passengers could prevent such accidents, and such requirement would be most unreasonable under present conditions."

A similar accident was before the court in the case of *Goss v. N. P. Ry. Co.*, 48 Ore. 439, 87 Pac. 149, wherein the Supreme Court of Oregon held that the mere closing of a door does not come within the maxim of *res ipsa loquitur*, but it should be made to appear that there was some defect in the door or in the fastening, or that the door was closed by some other act of negligence on the part of the company. It is true that in that case it was also held that it constituted negligence upon the part of the passenger to place his fingers on the door frame against which the door naturally closed.

In the case of *Hardwick v. Ga. R. & B. Co.*, 85 Ga. 507, 9 Am. Neg. Cas. 193, 11 S. E. 832, it was held that the closing of a car door by which a passenger's hand was injured under circumstances which

A passenger who had boarded a train at a flag station where there was no depot or agent, and so was obliged to enter the baggage car for the purpose of directing the baggage agent to unload his trunks at a certain point and to pay excess baggage thereon, is not guilty of contributory negligence by failing to look to see if there was any danger of mashing his finger between the knob and casing of the door before taking hold of the knob of the door of the baggage car in the usual way to close the door on his way to another part of the train. "Taking hold of a door knob to open or close a door," said the court, "is so commonplace an act and one so universally practiced that the court or jury would need no proof of the usual manner of doing it, but it is a matter of common knowledge that a person clos-

ing a door would catch hold of the knob and pull it shut, and in doing so it would not occur to the ordinary person that it was necessary to 'stop and look' to see if there would be danger of mashing his finger in the act before he would proceed to close the door, and he should not be charged with negligence for doing as any other ordinary prudent person would do under the same circumstances. The fact that people generally in closing doors, do not 'stop and look' to see if they are liable to be hurt would suggest to any one placing a knob on the door to be used for that purpose to place it where the person using it would not, in using it in the ordinary way, be liable to receive injury." *Creason v. St. Louis, I. M. & S. R. Co.*, 149 Mo. App. 223 (1910).

raised a much stronger inference of negligence than is present in this case was a pure accident, and did not authorize a recovery.

No case has been cited where, under circumstances as disclosed by this record, a recovery was permitted, and we do not think such a case can be found. It is possible that in case of an adult passenger the fact of exposing himself to such an injury may be held to be negligence upon his part which would prevent a recovery. Some of the courts held it to be such as a matter of law. (3 *Thomp. Comm. on Neg.* § 2987). But the cases, so far as we know, all hold that an injury caused by the mere closing of an ordinary car door, either while the car is in motion or while standing still, is a pure accident for which the carrier is not liable, unless the injury is caused by some defect in the door or its appendages, or is attributable to some act constituting negligence upon the part of the carrier. It seems to us that this is good law and good sense in view that the carrier is not an insurer as against an injury to passengers. If, in view of the evidence in this case, it should be held that respondent can recover, it would have to be based upon the theory that a common carrier of passengers assumes and insures against every risk and danger to which a passenger may be exposed, including the consequent injury arising therefrom. Such is clearly not the law. While the carrier is required to exercise the utmost degree of care to prevent accidents and injury to his passengers, he nevertheless is not an insurer of their safety. We remark, however, that, independent of the fact that the injured passenger in this case was an infant, we are not prepared to subscribe to the doctrine that under all circumstances in case of an injury to a passenger by the closing of a car door against his hand it should be held negligence as a matter of law for the passenger to place his hand upon the door frame at the place where the closing of the door would cause him injury. We prefer to rest our decision upon the ground that the evidence in this case does not establish culpable negligence under any rule of law by which negligence is established, and hence there can be no recovery. Upon the question of contributory negligence, therefore, we express no opinion.

From what has been said it follows that the court erred in refusing appellant's request to direct a verdict and in submitting the case to the jury, and in entering judgment for respondent on the verdict. The cause is reversed, with directions to the trial court to grant a new trial, appellant to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

SOUTHERN RAILWAY COMPANY v. BROOKS.

[SUPREME COURT OF TENNESSEE, DECEMBER 18, 1911.]

— Tenn. —, 143 S. W. 62.

Carriers—Statutory Precautions—Conflict of Duties to Passenger and Trespasser.

A passenger preparing to disembark from a train, which was almost in the act of stopping, is not entitled to recover for injuries sustained by being thrown against a seat by the recoil of the train, resulting from the application of the emergency brakes, in conformity with statutory requirements, to prevent striking and probably killing a boy who suddenly appeared on the track.

Certiorari to the Court of Civil Appeals to review a judgment of that court which reversed judgment rendered in favor of plaintiff, R. H. Brooks, in an action brought against the Southern Railway Company to recover damages for personal injuries caused by being thrown against a seat in a railway coach due to the alleged negligent operation of the train. Affirmed.

For plaintiff—King & King, and W. N. Hickey.

For defendant—Susong & Biddle, McCanless & Coleman, and Holloway & Hickey.

SHIELDS, C. J. This is an action to recover damages for personal injuries sustained by R. H. Brooks while a passenger upon one of the passenger trains of the Southern Railway Company. The accident occurred at a station of the railway company, while the train was moving at about two miles an hour and almost in the act of stopping, and resulted from the sudden application of the emergency brakes by the engineer, causing the entire train to lurch backward and recoil with unusual force and violence. The passengers for that

NOTE.

On the subject of Liability for Injuries to Persons Alighting from Street Cars and Trains, see note in 21 Am. Neg. Rep. 604-635.

And see, also, notes in 7 Am. Neg. Rep. 367; 9 Am. Neg. Rep. 17, 572; and 14 Am. Neg. Rep. 325, 334.

And on the same subject see Vols. 2-7 Am. Neg. Cas. where "Alighting and Boarding Cases," decided in all the

States and Territories and the Federal and Supreme Courts of the United States, from the earliest period to 1896 are reported and arranged in alphabetical order of States.

And for subsequent decisions to date, on the same subject, see Vols. 1-21 Am. Neg. Rep., and this volume (1 N. C. C. A.) and succeeding volumes of Negligence and Compensation Cases Annotated.

station had been notified to disembark and were preparing to do so. Brooks had arisen from his seat, turned towards the rear of the coach, and was in the act of going back to assist his wife, who was also a passenger, and, when the brakes were applied, was thrown down and against a seat, sustaining serious and permanent personal injuries.

The railway company in its defense proved by the engineer in charge of the locomotive that the brakes were applied in order to prevent the striking and probable killing of a boy who suddenly appeared upon the track some ten feet ahead of the pilot and was crossing to the opposite side, angling toward the engine, in compliance with the statute requiring certain precautions to be observed by railroad companies to prevent injuries to persons and animals upon the road before an approaching train.

The trial judge charged the jury that it was the duty of the railway company to keep some one upon its locomotives always upon the lookout ahead, and, when any person, animal, or other obstruction appeared upon the road, to sound the alarm whistle, put down the brakes, and use every possible means to stop the train and prevent the accident; but, while this was true, it was also its duty to exercise the highest degree of care, skill, and foresight possible for the safety of its passengers, and that it was not required to observe the statutory precautions when it would endanger the lives or limbs of passengers. In effect, the jury was instructed that, where the duty to observe the statutory precautions conflicted with that to passengers, the latter must prevail and be discharged. The charge is quite lengthy; but, while not in the words of the trial judge, the above is the substance and effect of the instruction given to the jury upon this subject.

There was verdict and judgment in favor of the plaintiff below. The railway company carried the case to the Court of Civil Appeals, and there assigned as error, among other things, the instruction to the jury above stated, which assignment was sustained, and the case is now before us upon certiorari prosecuted by Brooks to reverse the judgment of that court.

Railroad companies, as common carriers, undertake to safely carry and deliver their passengers at their destination. In the performance of this contract and obligation, it is their duty to exercise the highest practicable degree of care and skill, and for failure to do so they are liable in damages for all injuries sustained by passengers. They are not insurers of the safety of passengers, as they are of freight. Every one who travels on the conveyances of a common carrier assumes some risks, such as are necessarily incident to that mode of travel, and for an injury sustained without the fault or negligence of the carrier

there is no remedy. Injuries caused by the ordinary and unavoidable jolts and jars of moving trains are within this case. This duty of carriers to their passengers must be strictly discharged, and generally an injury to a passenger raises a rebuttable presumption of negligence and liability.

▲ Railroad companies also owe duties to persons who may appear upon their road, or within striking distance of their trains. The statute (Shannon's Code, §§ 1574-1576) requires railroad companies to keep the engineer, fireman, or some other person upon their locomotives always upon the lookout ahead, and, when any person, animal, or other obstruction appears upon the road, to sound the alarm whistle, put down the brakes, and employ every possible means to stop the train and prevent an accident, and provides that upon failure to observe these precautions the company shall be liable for all damages to person or property resulting from any accident or collision that may occur, and also, when such precautions are observed, that they shall not be responsible for such damages; the burden of proving the observance being upon the company. The provisions of this statute have been repeatedly held by this court to be imperative and mandatory, and to require absolute obedience. They must be complied with, regardless of whether it appears they are necessary or will be effective to prevent an accident. *Hill v. Louis. & N. R. Co.*, 9 Heisk. 823, 12 Am. Neg. Cas. 592n; *Railway Co. v. Foster*, 88 Tenn. 679, 12 Am. Neg. Cas. 593n, 13 S. W. 694, 14 S. W. 428.

When the precautions are not observed, the company is liable for the damages resulting from a collision. *Rapid Transit Co. v. Walton*, 105 Tenn. 417, 58 S. W. 737. The several requirements of the statute, sounding the alarm whistle, putting down the brakes, and employing all possible means to stop the train and prevent an accident, are all imperative. They are not to be observed in the order stated in the statute, but the precaution or thing which under the facts of the particular case is most available or effective to avert a collision and prevent the injury must be done. *Railway Co. v. Scott*, 87 Tenn. 501, 11 S. W. 317.

We have no case arising from an apparent conflict of these duties to passengers and persons upon the road where a passenger was injured. All our cases in any way involving the question here presented relate to injuries to persons or animals appearing upon the road before locomotives.

Routon v. Railroad Co., 1 Shan. Cas. 528, was an action to recover for a cow killed upon the track near a trestle, in which the engineer testified that it would have endangered the safety of the train to have

reversed his engine at that particular place. In discussing the necessity of observing the statute this court said: "The law does not demand of a railroad company the sacrifice of human life, either the lives of its employees or of its passengers in order to save a mere article of property."

Railroad Co. v. Troxlee, 1 Lea, 521, was an action to recover for a mule killed upon the road, where the engineer failed to reverse his engine because of danger, on account of the speed, of wrecking the train. In this case, it is said: "The statutes made by the Legislature for the government of railroads in cases of this kind are quite stringent, and we think justly so; but it certainly was never intended by the lawmakers that anything should be required which would endanger the lives or the limbs of persons upon the train."

The case of Railroad Co. v. Selcer, 7 Lea, 558, was also an action for a mule killed. The engineer testified that to have reversed the engine would have endangered his life and been very injurious to the engine. This court, in passing upon an error assigned for the failure of the trial judge to charge that upon the testimony of the engineer the company was excused from the observance of the statute, said that injury to the engine or machinery furnished no excuse, but in regard to the danger to the life of the engineer used this language:

"It has been repeatedly held by this court that if the train is moving at such speed, or if the circumstances of its situation are such, that it would endanger the lives of persons on the train, the engineer is not bound to reverse the engine, although by doing so the collision itself may have been avoided."

The case of Louis. & N. R. Co. v. Connor, 9 Heisk. 23, 12 Am. Neg. Cas. 594n, was an action to recover for the death of a child killed upon the road, in which it was insisted that the paramount duty of the company was to its passengers, and therefore observance of the statute where it would endanger their lives or limbs was not required. It is there said:

"We do not say that the means employed to stop the train should be such as would cause imminent danger and risk to the passengers; but a slight increase of the danger to the passengers would be no excuse for failing to follow the positive mandate of the statute. The facts of the case call for no further discussion of the question. There is no proof that any of the means usually employed to stop the train would be at great or imminent danger to passengers. It would not do to hold that employees running the train shall be allowed to excuse themselves from failing to comply with the positive requirements by the mere expression of an opinion that to do so would endanger the

passengers. The nature and extent of that danger should, at least, be more clearly shown."

The duty of railroad companies to safely carry and deliver their passengers is paramount to all others. They contract to do this, and public policy demands and requires a strict performance of the terms of the contract. This was so by the common law in force long before the enactment of the statute, and it was not the intention of the Legislature to modify or abrogate the duty in favor of trespassers. We are of the opinion, and hold, that the precautions prescribed should not be observed, when to do so would imminently imperil the lives or limbs of passengers and employees on the train. The object of the statute is primarily to protect human life, and to construe it otherwise than here done would in many cases defeat that object. But less than imminent danger of serious bodily injury or death to those on the train will not excuse observance of the precautions, especially when the life of one on the road is involved. In other words, the probability of slight injuries to passengers and employees, or even serious injuries growing out of unusual positions which they may at the time occupy, will not excuse observance of the statute for the protection of the life of a trespasser. While not directly involved here, we do not think the safety of passengers should be jeopardized in any case to prevent injuries to animals upon the road.

Humanity and public policy require that the duties of railroad companies to their passengers and to persons upon their roads be reconciled as far as possible to do so. No hard and fast rule can be made applicable to all cases. Each case where conflict presents itself must be determined upon its own particular facts. Where compliance with any particular provision of the statute, under attending conditions and environments, such as the speed of the train, a steep descending grade, a trestle or bridge, or other circumstance of peculiar danger, will imperil the lives or limbs of passengers with reasonable certainty, it should not be done. But where the place of the impending collision is level, or the speed of the train reasonably slow, or other conditions exist from which no great danger to passengers will ordinarily follow, or can be anticipated with reasonable certainty, usual conditions being considered, the statute must be observed, especially in favor of human life.

And in the event of a collision in the case first stated there will be no liability for injuries done persons or property upon the road, and in the latter there will be none to passengers upon the train. Neither the common law nor the statute requires impossibilities of railroad companies, or makes them liable for damages for acts which they are

required by law to do. Their agents in cases of this kind are compelled to determine their duty, and to decide between the conflicting interest of passengers and trespassers instantly and without reflection, in many cases a most difficult thing to do; and when this discretion is exercised upon reasonable grounds and in good faith, it must be considered, and is entitled to much weight in determining whether there was negligence, and consequent liability, upon the part of the company.

We do not think that the learned trial judge was as clear and accurate as he should have been in stating the conflicting duties of the company upon the facts of this case to the jury, and that the plaintiff in error was thereby prejudiced, and for this reason the judgment should be reversed, and the case remanded for a new trial.

Affirmed.

MORRISON v. LEE.

[SUPREME COURT OF NORTH DAKOTA, NOVEMBER 14, 1911.]

— N. D. —, 133 N. W. 548.

Explosives—Oil—Illegal Sale—Injuries—Contributory Negligence.

In an action based on the statutory liability of defendant under § 2223, Rev. Codes, 1905, by a person who has sustained injuries as the result of an explosion of oil sold in violation of law. *Held*, construing said statute, that the Legislature did not intend to abrogate the defense of the contributory negligence of the person injured, where such contributory negligence was the proximate and efficient cause of such explosion.

[Headnote by the Court.]

Appeal from an order of the District Court of Ward County, sustaining a demurrer to the answer in an action brought by James T. Morrison against Peter P. Lee to recover damages for personal injuries caused by an explosion of a mixture of kerosene and gasoline. Reversed.

For appellant—James Johnson and Guy C. H. Corliss.

For respondent—Arthur Le Sueur, and Bangs, Cooley & Hamilton.

AMENDED COMPLAINT.

For his amended complaint herein the plaintiff complains of the defendant, and alleges:

1. That the defendant herein is now, and at all the times herein mentioned was, engaged in the selling and delivering at retail, personally, and by his servants, agents and employees, certain oils commonly called and known as kerosene and gasoline, and other goods, wares and merchandise, for domestic use and consumption; said business being carried on in the City of Minot in said County and State.

2. That between the 20th day of November, 1902, and the 2d day of December, 1902, the defendant, in the course of his said business,

NOTE.

On the subject of Injuries Caused by Explosions, see notes in 7 Am. Neg. Rep. 535; 8 Am. Neg. Rep. 544; 9 Am. Neg. Rep. 657; 10 Am. Neg. Rep. 87; 13 Am. Neg. Rep. 434; 17 Am. Neg. Rep. 29.

And on the specific subject of Liability for Injuries Caused by Explosions from Various Oils Sold in Violation of Statutes, see 6 Am. Neg. Rep. 159; 10 Am. Neg. Rep. 590; 12 Am. Neg. Rep. 486; 16 Am. Neg. Rep. 40; 17 Am. Neg. Rep. 569.

did, by his servants, agents and employees, thereunto duly authorized, carelessly and negligently sell and deliver to the plaintiff upon plaintiff's request for kerosene oil, one gallon of a mixture of kerosene oil and gasoline for domestic use and consumption by plaintiff.

3. That the said mixture of said kerosene and gasoline so sold and delivered to plaintiff as aforesaid, had never been inspected, formed and constituted a highly dangerous and explosive mixture,—all of which the defendant, at the time of the sale and delivery of said mixture, well knew.

4. That at the time of the sale and delivery of said mixture, as aforesaid, defendant well knew that the commodity so sold was not kerosene oil but was a mixture of kerosene oil and gasoline; that the said defendant, his servants, agents, and employees, with knowledge of all the facts aforesaid, carelessly and negligently failed to inform this plaintiff that the commodity so sold and delivered to plaintiff was not kerosene, or that it was a mixture of kerosene and gasoline, or that the commodity so sold as kerosene was in any degree dangerous or explosive, but represented to him that the same was kerosene oil.

5. That thereafter, and on the 2d day of December, 1902, the plaintiff herein, relying upon the representation of the defendant, his agents, servants and employees that the commodity so sold and delivered to him was kerosene oil, believing the same to be true, and without knowledge, or means of knowledge, that said representation was false and untrue, or that the commodity so sold and delivered to him as kerosene was a dangerous or explosive compound, attempted to and did use said mixture as and for kerosene in a usual and careful manner, whereupon the said mixture so sold and delivered by defendant, his agents and employees to this plaintiff, and without fault or negligence on his part, exploded with great force and violence, caught fire and burned.

6. That by said explosion the burning mixture was thrown upon the body of the plaintiff, and his right arm and hand were thereby greatly bruised and burned, and he was thereby permanently injured and disabled from carrying on his usual trade and vocation as a painter; that by reason of such injuries this plaintiff has suffered, and still does suffer, great pain and mental anguish, and plaintiff has been informed and believes that he will never recover therefrom,—all to his great loss and irreparable damage in the sum of \$13,000.

7. That by reason of said physical injury, caused as aforesaid, the plaintiff has not been able to pursue his usual occupation of painting, and has expended and incurred great expense for medicines and medical attendance,—all to his further damage in the sum of \$2,000.

Wherefore, plaintiff demands judgment against the defendant for the sum of seventeen thousand dollars (\$17,000), together with his costs and disbursements herein.

AMENDED ANSWER.

I. The defendant, answering the amended complaint herein, admits the allegations contained in the first paragraph thereof.

II. The defendant, further answering, denies each and every allegation of the said amended complaint except that defendant admits that the plaintiff was injured by an explosion; and, for a further and separate defense, defendant alleges that the plaintiff was injured as aforesaid in the following manner, and not otherwise, to-wit: That plaintiff negligently poured from the spout of a gallon kerosene can kerosene oil therein contained onto and upon a burning fire in a stove, holding the said can of oil, while in the act of pouring the same upon the said fire, over and near to the said fire, and that the said act of pouring said kerosene upon said fire in the manner aforesaid was a negligent act and that the same was performed in a negligent manner, and that the explosion of the oil contained in the said can which injured the plaintiff was a proximate result of the negligence of plaintiff aforesaid and contributed to the injury sustained by plaintiff aforesaid, and that by reason of the said facts the injury sustained by plaintiff aforesaid, was the result of plaintiff's own negligence and that plaintiff's said negligence contributed to the said injury.

III. And the defendant, for a further defense, alleges that the sole proximate cause of the injury sustained by plaintiff was the plaintiff's negligence aforesaid.

Wherefore, defendant prays that this action be dismissed upon the merits and that defendant recover his costs herein.

FISK, J. This is an appeal from an order of the District Court of Ward county sustaining plaintiff's demurrer to the answer of the defendant. Plaintiff seeks to recover damages for personal injuries sustained by him as the result of an explosion of a mixture of kerosene and gasoline which he purchased of the defendant as and for kerosene oil. Plaintiff relies for a recovery upon § 2223 of the Revised Codes of this State, which reads as follows: "Whoever shall knowingly use, sell or cause to be sold unlawfully any of the illuminating oils specified in this article which are below one hundred and five degrees Fahrenheit, as tested by the official tests herein prescribed, shall be liable to any person purchasing such oil or to any person injured thereby for any damage to person or property arising from any ex-

plosion thereof." In other words, plaintiff bases his cause of action upon the statutory liability of defendant under the above section. The answer pleads a former adjudication. By such plea defendant alleges that the former action was instituted for the recovery of damages for the same injuries resulting from the same explosion, and that such explosion was caused by defendant's negligence in selling to plaintiff as and for kerosene oil a mixture of kerosene and gasoline; such cause of action being based upon the alleged common law liability of defendant. By such plea it is also alleged that the issues in such former action, including that of contributory negligence on plaintiff's part, were duly considered and adjudicated and finally decided in defendant's favor, and judgment was finally entered dismissing plaintiff's action.

The ground of demurrer to the above answer is that it does not state facts sufficient to constitute a defense to plaintiff's cause of action. Respondent's counsel advance two propositions of law in support of the action of the trial court in sustaining their demurrer: First, that the cause of action upon which the plaintiff seeks a recovery in this case is different and distinct from that set up in the case which appellant has pleaded in bar. Second, that contributory negligence is not a defense to this action. Appellant's counsel deny the soundness of both of these propositions. It is conceded, that, if either of such propositions are untenable, the demurrer was improperly sustained. We will take up these questions in the inverse order thus stated, and proceed to determine whether contributory negligence is a defense to this action. Does § 2223, Rev. Codes, "impose a positive and absolute liability, regardless of any contributory negligence on the part of the person injured," as contended by plaintiff's counsel? They assert that unless it does so the section would be superfluous and meaningless. We can best give their line of reasoning by quoting from their brief as follows: "For the sale of oil that will emit a combustible vapor at less than 105 degrees, a person injured has a right of action at common law, because this is an act prohibited by § 2222. That section contains many other prohibitions for the violations of any one of which an action may be maintained under the common law, by a person injured in consequence of such violation. But under the provisions of § 2223 the Legislature has seen fit to single out but one of these acts prohibited by § 2222, and has declared, in effect, that for the commission of that act the offender shall be absolutely liable to the person injured. If contributory negligence is a defense to an action under this section, the purpose of the statute would be in a great measure, if not wholly defeated."

In support of their contention counsel for plaintiff rely chiefly on a line of authorities under statutes making railroad companies liable for injuries to stock where they have neglected to fence or otherwise protect their right of way; and authorities under so-called "Factory Acts;" and also under statutes requiring owners of mines to take certain precautions for the protection of the miners. Among the authorities thus relied on are the following: *Corwin v. N. Y. & E. R. Co.*, 13 N. Y. 42; *Harwood's Adm'x v. Bennington & R. Ry. Co.*, 67 Vt. 664, 32 Atl. 721; *Congdon v. Cent. Vt. R. Co.*, 56 Vt. 390, 48 Am. Rep. 793; *Jensen v. Railway Co.*, 25 S. D. 506, 127 N. W. 650; *Flint & P. M. Ry. Co. v. Lull*, 28 Mich. 510; *Welty v. Indianapolis & V. R. Co.*, 105 Ind. 410, 4 N. E. 410; *Chicago, etc., Ry. Co. v. Fenn*, 3 Ind. App. 250, 29 N. E. 790; *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 7 Am. Neg. Rep. 40, 55 N. E. 131; *Caspar v. Lewin*, 82 Kan. 604, 109 Pac. 657, *Railway Co. v. Paxton*, 75 Kan. 197, 88 Pac. 1082; *Railroad Co. v. Martin*, 113 Tenn. 266, 87 S. W. 418; *Johnson v. Marshall, Sons & Co.*, 5 Am. & Eng. Ann. Cas. 630.

There are a great many authorities holding to the same effect, and they are collated in the valuable note to the case of *Wolf v. Smith*, 9 L. R. A. (N. S.) 338. An examination of the opinions in most if not all of these cases will disclose, however, that the plaintiff's negligence was remote rather than proximate to the injury, and it is nowhere held that the railway company is liable where the owner of the stock killed or injured wilfully or recklessly drove his stock upon the track. As said by Taft, C. J., in *Kilpatrick v. Grand Trunk Railway Co.*, 72 Vt. 263, 12 Am. Neg. Rep. 480, 47 Atl. 827, 82 Am. St. Rep. 939: "These cases can well be put upon the ground that the negligence of the plaintiff in permitting his animals to escape, stray away, and pass upon the railroad track was remote, and not proximate. If the negligence of the plaintiff consisted in his negligently driving cattle upon the track, at the time of the accident, it might well be claimed that such negligence was proximate, not remote, and that his negligence would bar a recovery. When the negligence of the plaintiff did not occur at the time of the accident, but was prior thereto, and consisted in permitting his animals to stray away, it is not mutual with that of the defendant, and was not one of the proximate causes of the accident; for, in the use of the words, 'proximate cause,' negligence occurring at the time the injury happened is meant. The case, in principle, is analogous to the one which formerly arose under the provisions of our early statutes, which enacted that 'if any special damage shall happen to any person, his team, carriage or other property, by means of the insufficiency or want of repairs of any high-

way or bridge in any town, which such town is liable to keep in repair, the person sustaining such damage shall have the right to recover the same,' etc. In these cases it has been universally held that if the plaintiff is guilty of contributory negligence, as one of the proximate causes of the accident, if his negligence contributes to his injury to any extent, he is not entitled to recover. But in such highway cases it was held that when the plaintiff's negligence consisted in taking a road constructed to avoid the dangerous place, which caused the accident, the plaintiff was not barred from a recovery, for the reason that his negligence was remote, not proximate. *Templeton v. Town of Montpelier*, 56 Vt. 328."

It is no doubt true, as contended for by respondent's counsel and as held in many of the authorities, that statutes similar to the one under consideration in the case at bar were enacted in the legitimate exercise of the police power and are penal in their nature, being designed for the protection of the public against injuries to persons and property, and are highly beneficial and should be strictly enforced. It does not follow from this, however, that a person who violates the statute is civilly liable for all damages occasioned by an explosion of the oil under all circumstances. We are here confronted with a question of statutory construction: Did the Legislature intend by the statute in question to impose on a person who has sold oil in violation of the statute, an *absolute* liability regardless of whether such violation had, in fact, anything directly to do with causing the explosion? It seems to us that it would be a forced construction of the statute to say that the Legislature intended to create a liability for an explosion, the direct or proximate cause of which was plaintiff's willful, reckless, or gross negligence. No authority has been called to our attention permitting a recovery under a statute where the plaintiff thus caused the injury. Yet, if respondent's contention be sound that the Legislature, by this statute, created an *absolute liability*, it would logically follow that, in an action to recover under such statute, a plaintiff's willful or gross negligence, which alone was the immediate and efficient cause of an explosion, would be no defense.

After a careful consideration of the matter, we are forced to hold that contributory negligence on plaintiff's part directly causing the explosion bars a recovery. Hence the ruling complained of was erroneous. We deem it well settled that, while a violation of a statutory duty may constitute negligence *per se* and actionable in case of resultant injury, yet imposing such duties do not abrogate the defense of contributory negligence unless the legislative intention so to do is clearly evinced in such statute. Such is the rule recently announced

by the Minnesota court in *Schutt v. Adair*, 99 Minn. 7, 20 Am. Neg. Rep. 598, 108 N. W. 811. It was there said regarding the violation of a statute requiring elevator shafts to be guarded and protected: "Though the violation of a statutory duty may constitute negligence *per se* and actionable if injury result therefrom, nevertheless statutes imposing such duties are not so construed as to abrogate the ordinary rules of contributory negligence, unless so worded as to leave no doubt that the Legislature intended to exclude the defense. 20 Am. & Eng. Ency. Law, 159; *Caswell v. Worth*, 5 El. & Bl. 849; *Hayes v. Railway Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; *Whitcomb v. Standard Oil Co.*, 153 Ind. 513, 55 N. E. 440; *Queen v. Dayton Coal Co.*, 95 Tenn. 465, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935; *Holum v. Railway Co.*, 80 Wis. 299, 50 N. W. 99; *Taylor v. Carew Mfg. Co.*, 143 Mass. 470, 15 Am. Neg. Cas. 637, 10 N. E. 308. It was not the intention of the Legislature in enacting this statute to create an absolute liability but rather to impose a duty upon persons operating warehouses and manufacturing establishments to guard and protect their employees from injury, the noncompliance with which constitutes negligence justifying a recovery by an injured servant, without further proof of a failure to exercise that degree of care enjoined by the rules of the common law. The general principles of the law underlying the right of action for personal injuries founded upon negligence remain the same, though the proof of negligence is simplified by showing merely a failure to obey the statutory commands. Contributory negligence will bar such an action precisely as it bars an action at common law. *Anderson v. Lumber Co.*, 67 Minn. 79, 69 N. W. 630; *Swenson v. Osgood-Blodgett Mfg. Co.*, 91 Minn. 509, 17 Am. Neg. Rep. 167, 98 N. W. 645."

We have a statute (§ 4295, Rev. Codes), requiring railway companies to give certain signals on approaching public crossings and providing a penalty for neglect to comply therewith, and also prescribing that such companies shall be liable for all damages which shall be sustained by any person by reason of such neglect; but it has never been contended that the contributory negligence of the person injured at such a crossing will not bar his recovery. On the contrary, such defense is recognized by all courts. *Hollinshead v. Minneapolis, etc., Ry. Co.*, 20 N. D. 642, 127 N. W. 993, and cases cited in note. See, also, *Mankey v. Chicago, etc., Ry. Co.*, 14 S. D. 468, 85 N. W. 1013, holding that before a recovery can be had under said statute it must be shown that the failure of defendant to give the statutory signals was the proximate cause of the plaintiff's damage.

A case arose in Mississippi under a statute, on principle, in all re-

spects like the one involved in the case at bar. The Mississippi statute limited the speed of trains through towns, cities, and villages and fixed a penalty for its violation, and which also provided: "And the company shall, moreover, be liable for any damage or injury which may be sustained by any one from such locomotive or cars whilst they are running at a greater rate of speed than six miles an hour through any city, town or village." A young man was killed by a train which was operated in violation of said statute, and in a suit by his mother to recover thereunder Campbell, C. J., said: "It is so clear that the unfortunate man who was killed contributed directly to his own death by his incautious and reckless action that the court properly told the jury the plaintiff was not entitled to recover. It is true that the defendant was guilty of a violation of law in the rate of speed at which the train was run, but this was *causa sine qua non*, while the *causa causans* was the imprudence of the person killed, so unmistakable as to authorize the assertion that he was the cause of his death." *Crowley v. Richmond & Danville R. Co.*, 70 Miss. 340, 13 So 74, 12 Am. Neg. Cas. 184n.

Our views also find support in the following authorities: *Meyer v. King*, 72 Miss. 1, 16 South. 245, 35 L. R. A. 474; *Reynolds v. Hindman*, 32 Iowa, 146, 14 Am. Neg. Cas. 590; *Dodge v. Burlington, C. R. & N. Ry. Co.*, 34 Iowa, 276, 11 Am. Neg. Cas. 537n. See note in 9 L. R. A. (N. S.) 339 and 342 and cases therein cited; *Curtiss v. St. Louis, etc., Co.*, 96 Ark. 394, 131 S. W. 947; *Dunphy v. New York, etc., Ry. Co.*, 196 Mass. 471, 82 N. E. 675, 13 L. R. A. (N. S.) 1152; *Queen v. Dayton Coal Co.*, 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935; 29 Cyc. 436, 437, 508; 21 Am. & Eng. Ency. of L. 483; *Quimby v. Woodbury*, 63 N. H. 370; *Bush v. Wathen*, 104 Ky. 548, 47 S. W. 599; 1 White on Personal Injuries on Railroads, 404, and cases cited: 1 Thompson's Commentaries on the Law of Negligence, §§ 10, 834.

Having reached the above conclusion, it becomes unnecessary to notice the other question.

The order appealed from is reversed, and the cause remanded for further proceedings.

GOSS, J., did not participate; HON. W. C. CRAWFORD, of the Tenth Judicial District, sitting in his place by request.

PETERS v. MICHIGAN CENTRAL RAILROAD CO.

[SUPREME COURT OF MICHIGAN, MARCH 31, 1911.]

165 Mich. 217.

Master and Servant—Injury—Fellow Servant.

A foreman in charge of a gang of laborers engaged in the construction of a branch line of a railroad, with power to hire and discharge men, is a fellow servant with the men under him with respect to orders given them in the management of a derrick used, pursuant to an order of his superior, for the removal of wreckage along the main line of the road, and so a servant who is injured while following such orders cannot recover of the master.

Appeal by defendant from a judgment of the Circuit Court of Bay County, rendered in favor of plaintiff in an action to recover for personal injuries caused by his hands being caught in the cogs of a derrick. Reversed.

For appellant—Cooley & Hewitt, (Humphrey, Grant & Baker, of counsel).

For appellee—De Vere Hall.

DECLARATION.

Porter F. Peters, of said county, plaintiff herein, by De Vere Hall, his attorney, complains of the Michigan Central Railroad Company, defendant herein, of a plea of trespass on the case, filing this declaration and the rule to plead endorsed thereon as commencement of suit.

For that whereas, on, to-wit: July 24, 1906, and for some years prior thereto, defendant was a corporation, organized, existing and doing business under the general railroad laws of said State and operating certain lines of railroad therein, one known as the Mackinaw Division extending from, to-wit: The City of Bay City, to, to-wit: The City of Mackinaw, passing through the City of Grayling, from near which point a second of such lines, known as the Lewiston branch, was extended to, to-wit: Lewiston, in the County of Montmorency, upon which lines it then and there operated trains consisting of cars drawn by steam locomotive engines over tracks, constructed by making cuts through and upon the ground where the surface there-

NOTE.

On the subject of the Fellow Servant Doctrine, see notes in 1 Am. Neg. Rep.

309; 3 Am. Neg. Rep. 109; 6 Am. Neg. Rep. 297; 7 Am. Neg. Rep. 182, 183; 8 Am. Neg. Rep. 193, 314.

of was above a grade established by defendant, and removing the dirt and earth therefrom, and by filling in dirt and earth where such surface was below such grade, thereby forming a roadbed for the reception of ties and iron rails whereon its said trains, engines and cars might be moved.

That in the operation of its said trains, engines and cars over such tracks, on occasions they would become derailed and wrecked, and it thereupon became and was necessary for defendant to clear away the same, employing for that purpose a large wrecking car having thereon a derrick and crane used in raising and shifting the position of such engines and cars, the said derrick and crane being operated by a handle upon or near to a large cog wheel, such wheel having spokes extending from the center to the circumference where it matched a certain other cog wheel, the cogs of the one engaging the spaces between the cogs of the other; that grease and oil were used in and about such derrick, crane and wheels that escaped and found its way onto such spokes, thus rendering them smooth and slippery to the hold.

That among the trains of cars so derailed and wrecked on, to-wit: July 24, 1906, was a certain train of cars on said Lewiston branch about which it became and was necessary to employ the said wrecking car with such derrick and crane for the purposes stated.

That on, to-wit: Said July 24, 1906, and for some time prior thereto, without previous or existing knowledge or information of the manner of operation of said wrecking car, derrick and crane, or of the dangers attending those working thereabout, plaintiff then and there was employed by defendant as one of its road crew, engaged in changing rails and putting in sidetracks on a certain branch connected with said Lewiston branch, under the direction of the foreman of such crew, and upon the occurrence of the derailling and wrecking of such cars, plaintiff and said crew under the charge of such foreman, thereupon were directed to withdraw from their said work and go to the same so derailed and wrecked, and assist in so removing and in replacing them, employing for such purpose the said wrecking car, derrick and crane.

And plaintiff alleges that being so hired and regularly employed by defendant, it then and there became and was the several duty of defendant:

(1.) Not to withdraw plaintiff from the said work which he was employed to do and require him to assist in removing the said cars so derailed and wrecked and in replacing the same onto such track.

(2.) Having so withdrawn plaintiff from the said work which he

was employed to do and required him to so assist in removing such cars and in replacing the same onto such track, not to require him to assist in the operation of such derrick and crane.

(3.) Having so withdrawn plaintiff from the said work which he was employed to do and required him to so assist in removing such cars and in replacing the same onto said track, he being so without knowledge or information of the manner of operation of such wrecking car, derrick and crane, not to require him to assist in the operation of such derrick and crane without imparting to him knowledge and information of the dangers attending those working thereabout and instructing him in the operation thereof.

(4.) Having so withdrawn plaintiff from the said work which he was employed to do and requiring him to so assist in removing such cars and in replacing the same onto said track, and having required him to assist in the operation of such derrick and crane, without knowledge or information then had or instruction then imparted to him of the dangers attending those working thereabout, not to require him to operate such wheel by removing his hand from the handle thereon and taking a hold with such hand of said spokes, so smooth and slippery with grease and oil, thereby exposing him to the danger of his said hand slipping therefrom and passing between the cogs of such wheels.

And plaintiff avers that then and there on, to-wit: July 24, 1906, defendant carelessly, negligently and wrongfully omitted its several duties in that regard in the following several particulars:

(1.) In that it did withdraw plaintiff from the said work which he was employed to do and did require him to assist in removing the said cars so derailed and wrecked and in replacing the same onto such track.

(2.) Having so withdrawn plaintiff from the said work which he was employed to do and required him to so assist in removing such cars and in replacing the same onto such track, in that it required him to assist in the operation of such derrick and crane.

(3.) Having so withdrawn from the said work which he was employed to do and required him to so assist in removing such cars and in replacing the same onto such track, he being without knowledge or information of the manner of operation of such wrecking car, derrick and crane, in that it required him to assist in the operation of such derrick and crane without imparting to him knowledge and information of the dangers attending those working thereabout, and without instructing him in the operation thereof.

(4.) Having so withdrawn plaintiff from the said work which he

was employed to do and required him to so assist in removing such cars and in replacing the same onto said track and having required him to assist in the operation of such derrick and crane, without knowledge or information then had or instruction then imparted to him of the dangers attending those working thereabout, in that it required him to operate such wheel by removing his hand from the handle upon or near the same and taking a hold with such hand of said spokes, so smooth and slippery with grease and oil, thereby exposing him to the danger of his hand slipping therefrom and passing between the cogs of such wheels.

And plaintiff avers that in consequence of the careless, negligent and wrongful omissions of defendant in the several regards above, at the time and place aforesaid, to-wit: July 24, 1906, on said Lewiston branch, as he was so withdrawn from his said work which he was employed to do and so required to assist in removing the said cars so derailed and wrecked and in replacing the same, by assisting in the operation of such derrick and crane and so without knowledge, information or instruction in the manner of operating the same, and without knowledge or information imparted to him of the dangers attending those working thereabout, while operating such wheel, he was required and directed by the foreman so in charge to remove his hand from the handle thereon to take a hold of said spokes, so smooth and slippery with grease and oil, as directed, and upon doing so, without fault or negligence on his part, or knowledge, notice or information of the danger attending the same, his right hand did slip therefrom into and between the cogs of such wheels and become involved therein, thereby seriously, painfully and permanently injuring him as hereinafter.

That as a result of the injuries the thumb of his said right hand was cut off, except as to a small part of the flesh, about half way between the first joint and end, and the bones between the main joint and where the thumb joins such hand were broken and crushed, and said thumb was split open where it attaches to and into such palm, thereby permanently destroying the usefulness of such hand.

That at the time of his said injuries plaintiff was of the age of, to-wit: Twenty-two, healthy, strong and able-bodied, and earning and capable of earning the prevailing wages of, to-wit: \$2.00 per day as laborer, and in consequence of the injuries so sustained he thereupon became and always will continue permanently injured in his said hand, and suffered and always will suffer great pain, and from thence hitherto has become and always will be incapacitated from performing such

work as laborer, or from attending to his affairs, work or business as he was accustomed to do.

That by reason of such injuries he has been compelled to lay out and expend large sums of money for medical and surgical aid, medicine, care and nursing, and will always be required to lay out and expend such large sums of money, and has and always will suffer great bodily pain, and his condition aforesaid is caused wholly from said injuries and the result thereof, to his great damage, in the sum of, to-wit: Ten thousand dollars (\$10,000), and, therefore, he brings suit.

PLEA.

To the foregoing declaration the defendant filed a plea of the general issue.

OSTRANDER, C. J. The plaintiff, being then 21 years old and employed by defendant, was injured July 24, 1906. He was one of a number of men employed as laborer in constructing a branch line of road. The foreman of these men, acting by direction of his superior, took them, or some of them, including the plaintiff, to a place where certain cars of defendant had been derailed and wrecked on the main line of defendant's road, to act as a wrecking crew. A flat car, which carried a derrick operated by hand, was a part of the wrecking outfit. Sent upon this car to assist in operating the derrick, plaintiff claims he received an order from the foreman to take hold of the spokes of the larger of the two wheels—the wheels having intermeshing cogs on the outer side of their circumferences—in obeying which order, the spokes being greasy, plaintiff's right hand slipped and was caught in the cogs. The foreman had authority to hire men and to discharge them. The trial court was of opinion, and ruled, that the foreman was a vice principal of defendant, and the issue submitted to the jury and the rules given for their instruction and guidance appear, sufficiently for the purposes of this opinion, in that portion of the charge which is here set out:

"The specific claim of plaintiff is that a few days before his injury he was employed by defendant, through one Edward Bovine, its foreman, as a member of an extra crew of men to be engaged in extending and constructing a line of track from said Lewiston branch, northerly, and that while so employed, and that on July 24, 1906, the day of his injury, he and others of such crew were withdrawn by said Bovine from such work and taken to the main line of said Lewiston branch, and directed by him to assist in removing such wreck; that such derrick or crane was an appliance with which plaintiff was unfamiliar,

designed for lifting of heavy loads through the use of a hand crank attached to a cog wheel operating a larger of such wheels; that plaintiff was set to work by said Bovine to assist in operating such wheels through the use of said crank; that just about dark of said day he was directed and ordered by said Bovine to remove such crank and take hold of the spokes of said larger wheel and operate the same through the same by the use of his hands applied to said spoke; and that unknown to plaintiff said spoke was covered with a black-colored grease or oil, disguised by color and a covering of dirt; and that as he took hold of such spoke to operate such larger wheel, while in the exercise of due care, his right hand suddenly and unexpectedly slipped from such wheel and passed between the cogs of said two wheels, injuring him as hereinafter stated. * * * I charge you as a matter of law that if said Bovine did direct and order plaintiff to take hold of the spokes of such larger wheel, and operate the same through the use of his hands applied thereto, and that such matter of operation was one not designed to be adopted and carried on, and that plaintiff was ignorant of the manner of use of such derrick or crane, and that said Bovine knew or should have known of the presence of such grease or oil upon said spokes, if the same was there, hidden by dirt, and relying upon such direction and order and not knowing that said spokes were covered with such grease or oil, and the same were so covered, hidden by dirt, so that he did not and should not have noticed such fact, and that he was ignorant of the danger of taking hold of the same and attempting to operate such wheel, if there was danger connected therewith, and that such direction and order was a negligent act on the part of said Bovine, and while operating the same in the exercise of due care on the part of plaintiff, his hand suddenly and unexpectedly did slip therefrom because of the presence of such grease or oil, and without fault did pass between the cogs of such two wheels injuring him as claimed, then he is entitled to recover such damages as he is shown to have sustained by such injury.

"You may as well understand, gentlemen, at this time as well as at another time, if Mr. Bovine did not direct plaintiff to take hold of the spokes, as claimed by plaintiff, then the plaintiff cannot recover, and a conclusion on your part to that effect would end the case. I charge you as a matter of law that if said Bovine did direct and order plaintiff to take hold of the spokes of such larger wheel and operate the same through the use of his hands applied thereto, and that such manner of operation was one not designed to be adopted and carried on, and that the plaintiff was ignorant of the manner of use of such

derrick or crane, and that said Bovine knew or should have known of the presence of such grease or oil upon said spokes, if the same was there hidden by dirt, and relying upon such direction and order, and not knowing that said spokes were so covered by such grease or oil, and the same were so covered, hidden by such dirt, so that plaintiff did not and should not have noticed such fact, and that he was ignorant of the danger of taking hold of the same and attempting to operate such wheel, and if there was danger connected therewith, and that said Bovine failed to advise and warn plaintiff of the presence of such grease and oil and of the danger connected therewith, if there was such danger, and that such direction and order of said Bovine and such failure on his part to so advise and warn plaintiff were negligent acts on the part of said Bovine, and, while operating such wheel in the exercise of due care on the part of plaintiff, his hand suddenly and unexpectedly did slip therefrom because of the presence of such grease or oil, and without fault did pass between the cogs of such two wheels injuring him, as claimed, then plaintiff is entitled to recover such damages as he is shown to have sustained by such injury. If said Bovine did give plaintiff direction and order to take hold of such wheel, then I charge you that the plaintiff would have the right to presume that there was no hidden or unknown danger connected therewith that the plaintiff either did not know or in the exercise of reasonable observation upon his part should not have known at the time that he took hold of the same.

"Plaintiff would not assume any risk arising from taking hold of said wheel that was not known to him or that in the exercise of reasonable observation upon his part he should not have known at the time. That I think may be broadened. If the plaintiff, by the exercise of the ordinary care of a reasonable and prudent person, could at the time and place in question have discovered, after he says the order was given to him, and before he took hold of the spoke, that it was covered with grease or oil as claimed by him, and notwithstanding this he took hold of said spoke, he was guilty of contributory negligence, and he cannot recover."

In this court, the single question debated by counsel is whether Bovine, the foreman, was, or was not, a fellow servant of the plaintiff.

It is proper to state that no testimony was introduced tending to prove either the incompetency of the foreman, that the derrick was not a suitable apparatus and in good order, that the foreman knew the spokes of the larger wheel were greasy or slippery, that the derrick was other than a simple machine, all of its parts being visible, or that any particular or peculiar hazard attended its operation by

the men at the cranks. On the contrary, the only reasonable inferences to be drawn from all of the testimony are that the foreman was competent, the derrick in proper order and a suitable apparatus for the work to be done, the oil, or grease, if there was any on the spokes of the larger wheel, came from the usual process of oiling the bearings, the duty assigned to plaintiff was the simple one of assisting a man to turn a crank which revolved a wheel, which, in turn, by the intermeshing of cogs, revolved a wheel, which revolved a drum upon which the rope or cable which passed up and along the arm of the derrick was wound. Four men, two at each crank, and on opposite sides of the derrick, handled the cranks. Whether the foreman directed plaintiff and the others helping him to take off the cranks and take hold of the spokes is disputed, and it seems to be undisputed that it was impracticable to apply energy to the spokes of the wheel for the purpose of either raising or lowering weight. Assuming the order to have been given and obeyed, it does not appear that obedience was attended with any hazard not perfectly obvious, unless it arose from a greasy or slippery condition of the spokes of the wheel.

The learned trial judge was of opinion that a distinction existed between the case presented and that of the section foreman in charge of a crew, engaged with them in a common employment, because the duties of Bovine, the foreman, in the particular instance, could not be defined or stated in advance; the method of accomplishing the desired result being left to some extent to his initiative and control with respect to which he had no superior or master. "It appears to me," he said, "that in the character of the work done, and the character of the management of the work, Mr. Bovine occupied a distinguished position, which it appears to me makes him a vice principal for the defendant for that business." We do not concur in this opinion. To use language employed by Mr. Justice Montgomery in *Schroeder v. Flint & P. M. R. Co.*, 103 Mich. 213, 223, 61 N. W. 663, 666 (29 L. R. A. 321, 16 Am. Neg. Cas. 111n, 50 Am. St. Rep. 354): "There was no defect in machinery. There was no negligence in the employment of servants. The injury did not result from the failure to properly instruct an inexperienced servant, nor did the injury result from a want of general rules for the management and conduct of the business." Nor did the foreman have complete control of the business of the master or of a disconnected branch thereof. In a sense, every section boss having orders to go to a particular point and repair track or roadbed, to clean up the right of way, and to remove obstructions therefrom, is given charge of the particular work, and performance is necessarily left to some extent to his judgment and discretion.

But he does not therefore become the *alter ego* of the common employer. *Corey v. Joliet Bridge & Iron Co.*, 151 Mich. 558, 115 N. W. 737, and cases cited in the opinion.

The judgment is reversed, and a new trial will be granted.

BIRD, HOOKER, MOORE and McALVAY, J. J., concurred.

ATKINSON V. AMERICAN SCHOOL OF OSTEOPATHY.

[SUPREME COURT OF MISSOURI, DIVISION NO. 1, FEBRUARY 29, 1912.]

— Mo. —, 144 S. W. 816.

1. Schools and Colleges—Joint Liability—Malpractice.

A corporation owning a medical school at which students are entitled to treatment as a part of the consideration for their payments, is jointly liable for malpractice with the president of the faculty who negligently treated a student as the agent of the corporation.

2. Trial—Negligence—Question for Jury.

Evidence of persons skilled in observing the nature and probable results of certain internal injuries and of those who have experienced the effects which have actually followed therefrom, is sufficient, in an action for malpractice, to take the question of the existence of the injury alleged to the jury, as against an objection that the history of the alleged injury is incredible and impossible.

3. Physicians—Osteopathy—Malpractice.

In determining whether treatment administered to a patient by a practitioner of the osteopathic school was careless, negligent and unskillful, the treatment must be judged by the methods and practice of that school.

4. Appeal—Instructions—Curing Error.

The failure of an instruction for the plaintiff in an action for malpractice, to specify the conduct to be observed in order to fill the requirements of ordinary care, is not cured by an instruction for the defendant limited to and based upon a particular and contested averment in the latter's case.

5. Appeal—Instruction—Reversible Error.

The giving of an instruction which is subject to criticism, but which occasioned no prejudice is not cause for reversal.

6. Evidence—Malpractice—Declaration of Agent—Admissibility.

The declaration of a physician practicing osteopathy, employed by a corporation conducting a school of osteopathy to treat a student previously treated by another osteopathic physician as agent of the corporation, to the effect that ailments of the student were caused by the treatment of the latter physician, are inadmissible in an action for malpractice brought against the corporation and such physician, because not a part of the *res gestae* and not within the scope of the agency.

Appeal by defendant from a judgment of the Circuit Court of Putnam County, rendered in an action brought to recover damages

NOTE.

On the subject of Liability for Malpractice, see note in 21 Am. Neg. Rep. 331.

See, also, Kline v. Nicholson, 151 Iowa, 710, reported in this volume (1 N. C. C. A.), page 290, *post*.

for malpractice in treating plaintiff, Grace Atkinson, for disease by the system known as "osteopathy." Reversed.

For appellants—Campbell & Ellison, and N. A. Franklin.

For respondent—John D. Smoot, C. C. Fogle, G. C. Weatherby, and John C. McKinley.

AMENDED PETITION.

Plaintiff, by leave of court, files this her amended petition, and for her cause of action states that the defendant, The American School of Osteopathy, is a corporation duly incorporated under the laws of the State of Missouri, and as such corporation can sue and be sued in the courts of the State of Missouri; that said corporation owns a large amount of real property in the City of Kirksville, Adair County, Missouri; that it conducts a school whereby it teaches the science of osteopathy and has a regular organized faculty composed of teachers of such science, conducting said school, and at the same time the members of said faculty practice the science in curing and healing the sick and the afflicted and the members of the said faculty practice their profession during their membership in said faculty, and it is the duty of each member of said faculty to treat and operate upon the students that attend said school during said attendance without charge; that the defendant, Chas. E. Still, is and was at the time hereinafter mentioned a member of said faculty and was aiding and assisting in teaching said science and in conducting said school, and while so conducting said school was authorized to practice his said profession as an osteopathic physician and surgeon, and was also authorized to treat the students of said school for any disease or complaint that they may have or contract during their attendance at said school, and that it was in the line of his duty when the injury hereinafter complained of was committed by him.

Plaintiff further complains of the defendant, and for her cause of action states that on or about October 1st, A. D. 1901, she became a student in the American School of Osteopathy at Kirksville, Missouri, paid her tuition in full for a course of instruction therein, and thereafter entered upon her duties as such student and was thereby entitled to the skillful treatment of any member of the faculty thereof for any disease that she might have or contract during her studentship, and she thereafter graduated from said school and became entitled to practice osteopathy; that at the time of entering said school the defendant, Chas. E. Still, was and ever since has been a practicing osteo-

pathic physician and surgeon and held himself out as a competent, able, and skillful osteopathic physician and surgeon, and able to successfully and skillfully treat all manner of human ills and maladies; that defendant was then and ever since has been president of and a member of the faculty of said school; that at the time plaintiff so entered said school she discovered that she had a slight affection of the nasal passages that slightly affected her breathing; that on or about said date defendant Chas. E. Still, made an examination of her case while she was then a student in said school, and as such physician and surgeon undertook to treat her said complaint and assured her that he would really relieve her thereof; that plaintiff submitted to his said treatment and defendant Charles E. Still thereupon began to treat her therefor and continued to treat her therefor until the — day of April, 1902, when defendant Charles E. Still so carelessly, negligently and unskillfully treated and manipulated plaintiff's body in so treating her for said maladies that he negligently and carelessly broke and crushed plaintiff's sternum, commonly known as the breast bone, and forced the same in and upon her lungs and bulged and forced out the cartilages of her ribs on the right side of her body into an unnatural position; that as a direct result of said unskillful, negligent and careless treatment and of the injury so inflicted upon her, she became sick and affected and has ever since suffered with asthma, uterine and rectal troubles, loss of flesh and suffered much bodily and mental pain, and her general health has been permanently injured and she has been incapacitated from practicing her said profession, or to earn her livelihood.

That by reason of the premises aforesaid, plaintiff says she has been damaged in the sum of twenty-five thousand dollars (\$25,000); for which she prays judgment and costs of suit.

ANSWER.

Defendant, C. E. Still, for his separate answer to plaintiff's amended petition says he is, and at all times stated in said petition was, an osteopathic physician.

That plaintiff at the time she began the study of osteopathy as a student in the year 1901, and before that time was afflicted with asthma.

That plaintiff graduated and became a Doctor of Osteopathy in June, 1903.

That during the time plaintiff was an osteopathic student he treated her osteopathically several times and always with his best skill and ability.

Defendant denies each and every other allegation in said petition contained.

SEPARATE ANSWER OF JOINT DEFENDANT.

The defendant, American School of Osteopathy, filed its separate answer to plaintiff's said Amended petition, as follows:

Comes now the defendant American School of Osteopathy and for its separate answer to plaintiff's petition says it denies each and every allegation therein contained.

STATEMENT OF FACTS: This is a suit by which the plaintiff seeks to recover from the defendants damages for malpractice in treating her for disease by the method or system commonly known as "osteopathy." She recovered judgment in the amount of \$10,000, from which this appeal is taken by the defendants. The suit was instituted April 17, 1906.

The amended petition on which the cause was tried states, in substance: That the defendant, the American School of Osteopathy, is a corporation; that it owns a large amount of real estate in Kirksville, Adair county, Mo.; that it conducts a school whereby it teaches the science of osteopathy, with a regularly organized faculty of teachers who are practitioners of the science, and whose duty it is to treat the students during their attendance at the school without charge; that the defendant still was a member and president of said faculty, duly authorized to practice said profession and it was in the line of his duty to treat the students; that plaintiff entered the school as a student about October 1, 1901, paid her tuition in full, and thereby became entitled to instruction and treatment, and afterwards graduated therefrom and became entitled to practice osteopathy. It then proceeds in the following words: "That at the time plaintiff so entered said school she discovered that she had a slight affection of the nasal passages that slightly affected her breathing; that on or about said date defendant Charles E. Still made an examination of her case while she was then a student in said school, and as such physician and surgeon undertook to treat her said complaint and assured her that he would really relieve her thereof; that plaintiff submitted to his said treatment, and defendant Charles E. Still thereupon began to treat her therefor, and continued to treat her therefor until the — day of April, 1902, when defendant Charles E. Still so carelessly, negligently, and unskillfully treated and manipulated plaintiff's body in so treating her for said maladies that he negligently and carelessly broke and crushed plaintiff's sternum, commonly known the breastbone, and

forced the same in and upon her lungs and bulged and forced out the cartilages of her ribs on the right side of her body into an unnatural position; that as a direct result of said unskillful and careless treatment, and of the injury so inflicted upon her, she became sick and affected and has ever since suffered with asthma, uterine and rectal troubles, loss of flesh and suffered much bodily and mental pain, and her general health has been permanently injured, and she has been incapacitated from practicing her said profession, or to earn her livelihood."

Defendant Still answered, admitting that he was an osteopathic physician, that plaintiff "began the study of osteopathy in 1901 and before that time was afflicted with asthma, that she graduated and became a doctor of osteopathy in June, 1903, and that during the time she was a student he treated her osteopathically several times, and always with his best skill and ability; and denied all other allegations of the petition." The defendant corporation answered with a general denial.

No question is made, either in the pleadings or evidence, as to the skill and learning of the defendant Dr. Charles E. Still in his profession of osteopathy. The following facts developed in the evidence are admitted and accepted by all parties to the controversy:

The plaintiff was a trained nurse, about 29 years old at the time of the alleged injury, whose home was at Brantford, Ontario, with her mother and brother. About the 1st of October, 1901, she went from Buffalo, N. Y., where she was professionally employed, to Kirksville, Mo., and was matriculated as a student of osteopathy in the school of the defendant corporation, paying a fee of \$300 for the course, which entitled her to free osteopathic treatment by members of the faculty, who were doctors of osteopathy duly qualified for the practice. She was suffering at the time from some ailment or weakness for which she desired treatment and became the patient of the defendant Dr. Charles E. Still, a son of Dr. A. T. Still, the president and founder of the school, and himself the vice-president. He treated her during this school year, which closed in June, 1902. She went home that summer, returned to Kirksville, in time for the term beginning in September, 1902, engaged in athletic sports to some extent that fall and the next spring, and graduated in June, 1903. Her brother was matriculated as a student of osteopathy at the same school in the fall of 1902, and graduated in June, 1904. In September of that year she began the practice of her profession in Albia, Iowa, where she stayed eight or nine months, at the end of which time she had become unable to practice. Before the bringing of this suit she had become a confirmed

asthmatic, and was greatly reduced in flesh. At the time of her matriculation in the Kirksville school she weighed from 100 to 102 pounds, and at the time of the trial 83 pounds. She has a distinct deformity of the thorax, consisting of an abnormal position of the breastbone and ribs which constitute the bony structure of its walls. Her condition seems to be considered incurable.

It is a theory of osteopathy that most diseases are caused by some displacement or abnormality of the bones, and the treatment consists largely of manipulation to correct this condition. In treating asthma and other diseases affecting the chest, the spine is manipulated to establish motion between the ribs and the vertebrae, and the ribs are sprung to establish better articulation to the spinal column, all portions of which are felt to detect what is wrong. In doing this it is customary to place the knee against the breastbone to immobilize the thorax, and then to press forward on the backbone and posterior ends of the ribs. This is called the knee treatment, and students are especially cautioned to use it carefully to prevent injury, and both the defendant, Dr. Still; and Dr. Laughlin, dean of the faculty of the defendant school, testified that the application in this position of such force as to fracture or dislocate the parts involved would be improper practice.

As to matters in dispute: The plaintiff testifies that when she came to Kirksville she had been working on a hard case, was nervously run down, and had a little whistle in her nose. The defendant Dr. Still treated her from a short time after her arrival until April, 1902, when she claims to have received the injury complained of under circumstances which she describes in her testimony as follows: "He came in the room, and he said 'Good morning, Miss Atkinson, how are you this morning?' I said: 'Dr. Charley, you are not doing me a bit of good, I am getting worse.' He said, 'I will take that out of you, or I will break your neck,' and with that he put his knee against the breastbone and by putting his arm around the back he pulled with his hand and pushed with his knee, and drew me forward like that, and I said 'Dr. Charley, you crushed my sternum in the breastbone.' He said, 'I guess not.' I said, 'You did; I know you did.' And he said, 'O, I guess not.' And I said, 'Well I know you did,' and he went around to the back and felt the condition, and he said: 'I guess you will come out all right. I didn't realize that you were so small. I have just been treating a 200-pound woman, and didn't realize the weight I was putting on you.' " She said that she just felt the bone crush; that there was no special pain that day; that it hurt a little, and the third day it pained her so bad that she turned sick and had to leave the class.

She then had to go to bed and had stabbing pains all the time for two or three days and then got better. In the fall of 1902 she had her first attack of asthma, and it grew worse and worse. She suffered much pain around the ribs which stood out prominently on the right side, and her breastbone was sunken. She said that as a consequence of this injury she also had female, bowel, and kidney troubles, and an abscess on the lung. She also says that at the time she went to Kirksville and applied for treatment she thought that the wheezing in her nose was asthmatic, and "supposed perhaps asthma might have been coming on." Her father and one sister had had asthma. As to the condition of the parts affected after the time stated by her as the date of the injury, she introduced much testimony of expert osteopaths, graduates of the defendant school, who testified that they had then examined her; that some of her ribs were dislocated and the cartilages fractured; that her breastbone was fractured or out of place; that the injuries would probably be produced by such violence as that described by her in her testimony; and that the asthma and other difficulties from which she suffered would probably be the result of these injuries. She also introduced evidence of admissions made by defendant Still, one of them being a statement said to have been made in a lecture delivered in the school by defendant Still, as a member of the faculty, cautioning his class against the application of the "knee-treatment," to the effect that he met with an accident like that, in which he had broken the ribs and sternum of that "Atkinson girl."

On the other hand, all violence and injury is denied by evidence introduced by defendants, which tends strongly to prove that the plaintiff was afflicted with asthma when she came to Kirksville in 1901, that it had progressed until she had become a confirmed asthmatic, and that the physical deformities and diseases which she ascribes to the injury alleged in the petition are the natural effects of that disease. They also introduced expert testimony to show that the necessary and immediate result of such an injury as she claims to have received would have been much more serious than that which is admitted by her to have followed it.

The plaintiff having been introduced as a witness in her own behalf, the following question, referring to Dr. George Laughlin, was asked her by her counsel: "After Dr. Charley had sent George to treat you after the time spoken of in the last question, and while he was so treating you—I believe that was in 1902—what other statements, if any, did he make as to the condition he found you in, and the cause of your affliction?" The defendants duly objected to this question, and, after overruling the objection, to which action the defendants except-

ed, the court said to the witness: "In answering this question confine yourself to the statement made while he was in the official treatment of you." The objection was then renewed and overruled, to which exception was saved, and the witness answered: "He said that the second, third, and fourth ribs were broken; caused from Dr. Charley's treatment." She was then asked: "He knew of the treatment Dr. Charley had given you?" and answered: "Yes, sir." Then, upon objection of defendants, the court said: "Strike out that 'he knew.'"

At the close of the evidence the defendants asked the court to peremptorily instruct the jury to find in their favor, which the court refused to do, and the defendants duly excepted. It then requested four other instructions numbered from 2 to 5 inclusive, in substance as follows: (2) That the jury must not permit sympathy for plaintiff to influence their verdict. (3) That if they should find from the evidence that defendant Still, while treating plaintiff, fractured the sternum, and bulged or forced out the cartilage of the second, third and fourth ribs, yet that fact alone does not prove or tend to prove that such treatment was either negligent or unskillful. (4) That if they should find from the evidence that the plaintiff had asthma when she entered the school, she should not recover. The court refused each and all these instructions, to which action the defendants saved their exceptions.

The court then, at the instance of the plaintiff, gave the jury six instructions, the first of which is in words and figures following:

"No. 1. You are instructed in this case that the plaintiff sues the defendant, the American School of Osteopathy and Chas. E. Still, claiming in her petition that Chas. E. Still was the agent and representative of the defendant school of osteopathy, and, as such representative and agent was employed by her to treat her for an ailment. And she further claims that in treating her for said ailment he carelessly and negligently pressed his knee against her sternum near the gladiolus and put his hands behind her and pulling with his hands and pressing with his knee, crushed, depressed, or fractured said gladiolus, and fractured the cartilage of the second, third, and fourth ribs between the end of the rib and the sternum, and that by reason of said treatment she suffered great pain and anguish of mind. Now, if you believe and find from the greater weight of the evidence that the said defendant was the agent and servant of the American School of Osteopathy, and that in treating the plaintiff he did carelessly and negligently press his knee in her sternum near the gladiolus, and his hands behind her back, and pulling and pressing with the knee with such force that it did produce a fracture or depression of the gladiolus and a fracture of the

second, third, and fourth ribs or the cartilage thereof, and that said treatment was negligently and carelessly administered by the defendant and was improper treatment of plaintiff, and if you further believe that she suffered pain by reason of said treatment, then your finding should be for the plaintiff, and you should assess to her such damages as you may believe and find will compensate her for said suffering and pain, not exceeding the sum limited in these instructions."

The second, after describing the treatment complained of practically as in the first, told the jury that if they believed "this treatment was carelessly and negligently administered and was not such treatment as is properly and ordinarily administered in such cases, and * * * that plaintiff by reason of such treatment suffered great pain, and * * * asthma resulted, from which she has since suffered, and become unable to do any labor or perform any services, * * * and * * * became incurable by reason of such treatment," their finding should be for plaintiff.

In No. 3 the jury were told that if, in such treatment, defendant Still, carelessly, negligently, and unskillfully "did hurt, bruise, and injure plaintiff in and upon her sternum, and the ribs attached to the sternum, the verdict must be for the plaintiff."

The fourth directed them that if such treatment was improper, and not such as an ordinarily skillful and careful man would have given the plaintiff under the circumstances, they should find for the plaintiff.

The fifth directs that if defendant, in the treatment of the plaintiff, "negligently and carelessly pressed his knee against her sternum and hands behind her, and negligently and carelessly used such force by pressing and pulling plaintiff that he fractured the sternum and crushed it in upon her chest and fractured ribs, and by reason of such treatment she became permanently injured, lamed, and suffered great pain," the jury should find for the plaintiff.

In the plaintiff's sixth instruction the elements of damage submitted arising from the same injury consisted of solely "pain and anguish of both body and mind."

For the defendant the court instructed the jury as follows:

"No. 1. If you find and believe from all the evidence that plaintiff, when she entered the defendant school, was afflicted with asthma, and that thereafter the defendant Chas. E. Still treated her for that disease, and in so treating her adopted the usual osteopathic method of treating asthma, and used ordinary care and skill in treating her, then plaintiff cannot recover, and your verdict must be for the defendant, regardless of any other fact or issue in the case.

"No. 2. Although a person who is being treated by a physician may grow worse, or even if the patient dies under his care, yet such fact of itself alone furnishes no evidence that such physician was guilty of either negligence or unskillfulness."

BROWN, C., (after stating the foregoing facts). I. The plaintiff makes no complaint, either in her petition or the proceedings at the trial, that the defendant Still did not possess the qualifications required by the provisions of article 4 of chapter 128 of the Revised Statutes of Missouri 1899, with reference to osteopathy, or that he did not possess the requisite skill for the treatment of diseases by the methods prescribed by that system. She simply claims that in the exercise of that profession he treated her so carelessly, negligently, and unskillfully as to produce the injuries of which she complains. Nor do the defendants question the assertion that the defendant Still treated the plaintiff as the agent and employee of his co-defendant, the American School of Osteopathy, so that corporation would be jointly liable with him for damages resulting from any such negligence. They do contend, however, that in this case there is no substantial evidence that Still was negligent in his treatment of the plaintiff, or that she suffered any injury or damage on account of it, and that for that reason the trial court should have directed a verdict for them. They say "that the history of her alleged injury is incredible and impossible, both from a physical and psychological standpoint," and explain that, "if she had suffered bone fractures, instant and severe pain and prostration would have followed, as certainly as fire will burn, or water run down hill." The inference seems to be that her assertion that after suffering these injuries, and a few days of confinement and pain therefrom, she so far recovered as to pursue her studies and engage in sports for more than six months before the serious phases of the injury developed, is contrary to some well-known and universally recognized natural law, like the force by which we may assume that water will run down hill, or to universal human experience from which also we are permitted to assume that fire will burn. We fail, however, to appreciate the application of that argument to the evidence in this case. Many of us have not had the fortune to sustain similar fractures, and cannot therefore speak from personal experience; but we have learned by observation as well as common information that apparently similar lesions of the human tissues produce widely different results, even in cases exposed to the most casual visual observation, and, in cases of internal injuries, we are prepared to receive the evidence of those skilled in observing such things as to their nature and probable results, as well as the testimony of those who have seen or experienced

the effects which have actually followed them. Considered from this standpoint, there is no lack of evidence, for the consideration of a jury, of the injuries charged in the petition, and no error was committed by the trial court in refusing to withdraw it from their consideration.

II. The defendants also complain of the instructions upon which the case was submitted for the plaintiff, because, they say, the question of negligence in the treatment of plaintiff was submitted to the jury in general terms without any explanation of the nature and extent of the duty assumed by defendants in relation to said treatment for the neglect of which the plaintiff might recover. This point may be illustrated by quoting from the fourth instruction given for the plaintiff, as follows: "And, if you further believe that such treatment was improper and not such as an ordinary skillful and careful man would have given the plaintiff under the circumstances, then you will find the defendant's treatment of plaintiff by the said Chas. E. Still, as the agent and servant and employee, was careless and negligent, and unskillful." This instruction, as well as all the other instructions given for her, ignores the fact that the plaintiff submitted to the treatment furnished by the defendant's school knowing that it was to be applied according to the system known as osteopathy, and that treatment according to this system was contemplated in her contract, and gave the jury the right to find that osteopathic treatment was not proper treatment, and that persons administering it were not ordinarily skillful and careful; while the law is that her treatment must be judged by this method. *Grainger v. Still*, 187 Mo. 197, 85 S. W. 1114; *Patten v. Wiggin*, 51 Me. 594, 81 Am. Dec. 593; *Force v. Gregory*, 63 Conn. 167, 27 Atl. 1116, 22 L. R. A. 343, 38 Am. St. 371. The merit of the system which the plaintiff had deliberately chosen was placed on trial by these instructions, and the jury was plainly authorized to find a verdict in her favor on the ground of her own mistake in choosing unwisely. Our statute, already referred to (R. S. 1899, §§ 8537-8539), expressly recognizes osteopathy as a "system, method or science of treating diseases of the human body," and the defendant school as the exponent of its method and practice. It also expressly authorizes persons having diplomas from that or any other legally chartered and regularly conducted school of osteopathy to treat diseases of the human body according to such method. In so doing it necessarily permits and authorizes persons to contract for such treatment. It is true that § 8537 provides that osteopathy is "not to be the practice of medicine and surgery within the meaning of article 1 of this chapter, and not subject to the provisions of said article;" but

the purpose so expressed is simply to segregate this particular system from those for the regulation of which article 1 was enacted. All these systems, methods, or sciences are directed to the treating of diseases of the human body, and each stands upon the merits of its own system. This is evidently one of those "cases in which the conduct to be observed in order to fill the requirements of ordinary care should be specified in the instruction." *Nephler v. Woodward*. 200 Mo. 179, 187, 98 S. W. 488; *Hayden v. Railroad Co.*, 124 Mo. 566, 28 S. W. 74; *Dairy Co. v. Railroad Co.*, 98 Mo. App. 20, 71 S. W. 726.

It is suggested by the plaintiff that the error embodied in these instructions is cured by the first instruction given for the defendants, which tells the jury that if the "plaintiff when she entered the defendant's school was afflicted with asthma, and that thereafter the defendant Charles E. Still treated her for that disease, and in so doing adopted the usual osteopathic method of treating asthma, and used ordinary care and skill in treating her, then plaintiff cannot recover." This instruction, it will be observed, only applies in the event that when the plaintiff entered defendant's school she had asthma, and is confined in its scope to the treatment of asthma alone, so that the plaintiff's contention cannot be sustained unless we assume the truth of one of the most strongly contested averments in the defendant's case, which we are not at liberty to do.

A more plausible defense of these instructions is made upon the testimony of both the defendant Dr. Still, and Dr. Laughlin, dean of the faculty of the defendant's school, to the effect that the application in the position described in the evidence, of such force as to fracture or dislocate the parts involved, would be improper practice. The plaintiff contends, with much reason, that this testimony, being undisputed, left nothing to be determined by the jury except the simple question whether or not such injuries were produced in the manner described, and eliminated all question of negligence from the issue. The jury necessarily passed upon this simple question of fact, and it is insisted that their verdict ought not to be disturbed because it was submitted in connection with others not necessary to be considered by them. Under these circumstances, we think that the objection made to these instructions is purely a technical one, not affecting the real merits of the controversy. The fact, however, that the trial was, in its principal features, a juratory contest over the existence of the facts asserted by plaintiff as the foundation of her suit, emphasizes the importance of the duty of the court to see that it was fairly conducted, in accordance with the rules prescribed by law for

ascertaining the truth. This leads us to the consideration of the most important question in the case.

III. The plaintiff was permitted, against the objection of the defendants properly made, to testify on the trial that Dr. Laughlin, the osteopath, who, at the instance of the defendants, treated her after the date of the alleged injury for the ailments from which she was then suffering, told her that her second, third, and fourth ribs were broken, *caused from Dr. Still's treatments*. The cause of her condition was the real question in issue. In its bearing upon the question, the evidence complained of was of the utmost importance and might well have turned the scale in favor of the plaintiff when weighed with the mass of conflicting statements before the jury.

The question is one of importance, because, if such testimony is admissible, it opens one more door by which verdicts may be recovered upon unsworn gossip, instead of sworn testimony, and makes it dangerous to furnish the first surgical aid to injured employees, which, happily, most employers are glad to render. This evidence was admitted on the ground that the doctor was the agent of the defendants in the treatment of the plaintiff, and, if his statement as to the cause of the injury was made during this treatment, it was, by reason of its concurrence in point of time, a part of the *res gestae*; ignoring entirely that the *res* was not the treatment being administered by Laughlin, but the treatments that had long before been administered by Still, to which the words "caused from Dr. Charley's treatment" could alone apply. In support of her position in this respect the plaintiff relies on *Phillips v. Railroad*, 211 Mo. 419, 111 S. W. 109, 17 L. R. A. (N. S.) 1167, 124 Am. St. Rep. 786, 14 Ann. Cas. 742. In that case the witness was the chief surgeon of the defendant railroad company, the question was the mental condition of a man in his charge, and the evidence was his official report on that very question, made in the performance of his official duty, and was therefore properly held to be the statement of the company by its general officer charged with the duty and therefore the authority to make it. It has no application to this case, in which Dr. Laughlin was not employed by defendant to talk of past occurrences, but only to treat the patient. In doing this (not *while* doing it) he had authority to act and speak for his principal.

Any fact material to the interest of either party to an action, which rests in the knowledge of another, is to be proved by his testimony and not by his mere assertion, unless the party has authorized him to make the assertion. This doctrine was well stated by Mr. Justice

Kennedy in *Hannay v. Stewart*, 6 Watts (Pa.) 487, 489, as follows: "The statements of an agent, generally, though made of the business of his principal, are not to be taken as equivalent to the admissions of the principal, for then the latter would be bound by them, whether true or false, which would render the situation of every principal truly perilous. Every man has a right to make such representations of what he has done as he pleases, and to bind himself to abide by them, whether true or otherwise; and they, of course, may be given in evidence against him afterwards, when relevant to the issue trying—not, however, because the facts therein stated are true, but because he has the right to pledge himself in the same manner as if they were true. And if true, justice naturally requires that he should be bound by them, or, if not, it is no more than the infliction of a just penalty for his disregard of truth. But it would not be reasonable to hold him responsible upon the same principle, for the declarations of his agent; nor upon any principle except that of truth and the protection of those, against loss or injury, that might otherwise arise from their having confided in the representations of the agent, made by him at the time of entering into the agreement, or of transacting the business, under the authority of his principal. According to Mr. Phillips, in his treatise on Evidence, vol. 1, p. 77, it is only the statements or representations of the agent, made in effecting an agreement or doing an act within the scope of his authority, that are evidence against his principal, and considered equivalent to his own acknowledgements; because, as he says they may be explanatory of the agreement, or determine the quality of the act, which they accompany, and therefore must be binding on the principal, as the act of agreement itself."

This same reasoning is epitomized by this court in *McDermott v. Hann. & St. J. R. Co.*, 73 Mo. 516, 519, 16 Am. Neg. Cas. 503n, 39 Am. Rep. 526, as follows: "The declarations of an agent are received, not as admissions, but as a part of the *res gestae*. * * * Only declarations, therefore, made by the agent while transacting business within the scope of his agency, and then only because a part of the *res gestae*, are admissible."

No pair of words in our legal terminology are more carelessly used than these words "*res gestae*." In applying them to the subject we are now considering, we should bear in mind that they refer to the thing done by the agent, and that words to be a part of the *res gestae* must be used in furtherance of the doing of that thing. This court, in *Price v. Thornton*, 10 Mo. 135, 140, put the doctrine in a nutshell. In speaking of the admissions of a shipmaster against the owners, it said: "They are bound for the conduct of Capt. White; not for what

he might say he had done." In this case it is sought to bind the defendants by the unsworn statement of Dr. Laughlin as to what one of them—not he—had done long before. To hold that this can be done would be a long step toward depriving litigants of whatever protection there may be in the sanctity of the oath and the influence of legal pains and penalties for perjury.

The opinion already expressed renders it unnecessary to notice any of the numerous other errors assigned by the appellants in their brief.

For the reason stated, the judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

BOND, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is hereby adopted as the opinion of the court.

VOL. I. Negl.—19

KLINE v. NICHOLSON.

[SUPREME COURT OF IOWA, APRIL 5, 1911.]

151 Iowa, 710.

1. Physicians—Malpractice—Evidence.

In an action for negligence of a physician in attending a woman at child birth and in treating her afterwards, evidence held to be sufficient to warrant a recovery.

2. Physicians—Degree of Care.

In an action against a physician to recover for injuries resulting from the negligent and unskillful use of instruments in the delivery of a child, it is no defense that the physician had knowledge and skill required for the practice of his profession, and that the mistake made was only an error of judgment.

3. Physicians—Care—Question for Jury.

In an action against a physician to recover for malpractice, it is a question for the jury to determine, whether in treating the patient, he used the care, judgment, and skill required.

4. Physicians—Malpractice—Instructions.

In an action for malpractice brought against a physician practicing in a small country town, an instruction that if defendant possessed and employed in the treatment of his patient such reasonable skill and diligence as were ordinarily exercised by the members of his profession at and in localities similar to that in which he practiced, he would not be responsible for the result of the operation, is not error.

Appeal by plaintiff from a judgment of the District Court of Greene County, rendered in favor of defendant, in an action brought to recover compensation for medical services, in which a counter-claim for damages for negligent treatment was interposed. Affirmed.

For appellant—B. O. Clark, and Guernsey, Parker & Miller.

For appellee—W. C. Saul.

PETITION.

The demands of the Petition being admitted by the defendant, the case went to trial on defendant's answer and counter-claim, and plaintiff's reply thereto.

NOTE.

On the subject of Liability for Malpractice, see note in 21 Am. Neg. Rep. 331.

See, also, *Atkinson v. American School of Osteopathy (Mo.)*, reported in this volume (1 N. C. C. A.), page 275, *ante*.

ANSWER AND COUNTER-CLAIM.

Comes now the defendant and for answer to plaintiff's petition filed herein states:

That of the allegations therein contained he has neither knowledge nor information sufficient to form a belief, he therefore denies the same, and for further answer and by way of counter-claim states:

That the plaintiff is a physician and surgeon and that he held himself out to this defendant and to the public generally as a competent and skillful practitioner; that this plaintiff was, on or about the 10th of April, 1906, employed as such by this defendant to attend to his wife, who was about to be delivered of a child, for compensation to be paid therefor, and for that purpose he undertook, as a physician and surgeon, to attend and care for her.

That the plaintiff then and there entered upon such employment but did not use due and proper care and skill in treating this defendant's wife, in this—that in attempting to deliver this defendant's wife of the child, he was negligent in the use of instruments; that he negligently used defective instruments; that in the unskillful and negligent use of the instruments, he lacerated and wounded the wife of this defendant, and that afterward, in treating such laceration, he negligently and carelessly took stitches in said wound and laceration, and that afterwards, about two weeks later, he removed such stitches in a negligent and careless manner. That he was negligent in the use of drugs and medicines on the wounds referred to above; that by such negligent use of drugs, he prevented the wound from healing; that in treating the wound he was so negligent and unskillful that he neglected to properly dress and pack the same; that by such unskillful, and negligent treatment, together with the negligent and unskillful use of medicines on such wound, the wound was prevented from healing. That said injury above complained of and the resulting injuries were caused wholly by the negligence and unskillfulness of this plaintiff, and without any fault or negligence on the part of this defendant or his wife.

That by reason of the several premises, the defendant has been and was obliged to expend the sum of \$500 in endeavoring to cure his wife of such injuries which were caused by and increased by the said unskillful and improper conduct of the plaintiff. That he has been damaged in the sum of \$5,000 for the loss of the services and society of his wife, no part of which has been paid.

Wherefore, he seeks judgment against this plaintiff for the sum of \$5,500, with interest thereon from the 11th day of April, 1906, and for costs of this action.

REPLY.

Comes now the plaintiff and for reply to defendant's counter-claim filed herein states to the court:

The plaintiff denies each and every allegation, statement, averment and inference contained in said counter-claim, not hereinafter admitted, modified or explained.

The plaintiff admits that he is a physician and surgeon, and now resides at Scranton, Iowa, and so resided there at the time referred to in defendant's counter-claim, and that he was employed by defendant on or about April 10th, 1906, for compensation to be paid therefor to deliver his said wife of a child, and that he held himself out to the public as possessing the usual and ordinary skill that physicians and surgeons usually possess in similar localities to said Scranton and that he, on or about the said date entered upon said employment, and did deliver the defendant's wife of a child.

The plaintiff further admits that in the delivery of said child he used instruments, but denies that he used defective instruments or that he negligently used the instruments, and avers that it was necessary to use the instruments in the delivery of said child on account that it was of abnormal size, and to aid the defendant's said wife to be delivered of said child and avers and alleges that said instruments used by this plaintiff were standard make, and those used by the profession in general, and that he used them in a skillful and careful manner in every respect and particular, and that the said wife of the defendant was not lacerated and wounded to any greater extent in the delivery of said child by this plaintiff than could possibly be avoided by the use of all possible care and diligence on the part of this plaintiff in the use of said instruments and the delivery of said child.

Plaintiff admits that he took stitches drawing the lacerated parts of the defendant's wife together in a careful, proper and skillful manner so that they would heal, and alleges that he afterwards removed said stitches in a careful and skillful manner.

Plaintiff admits that he used drugs and medicines on the lacerated parts of defendant's wife caused by the delivery of said child, and alleges and avers that the drugs and medicines so used were those recommended and used by the medical profession generally in such cases and for such injuries, and that they were the proper treatment for such injuries, and that they were used and directed to be used by this plaintiff in a careful and skillful manner by this plaintiff on the defendant's said wife.

The plaintiff further avers that he properly, carefully and skillfully dressed said lacerated parts of said defendant's wife and treated the same carefully and skillfully in every particular and manner at all times during his attendance upon treatment of her.

Wherefore, the plaintiff prays that the defendant's counter-claim be dismissed and that he have judgment as prayed for in his petition and for the costs of this action.

McCLAIN, J. The allegations in the counter-claim of negligence submitted to the jury were that plaintiff, in effecting the delivery of defendant's wife during child labor, negligently used instruments; that in the negligent and unskillful use of the instruments he lacerated and wounded defendant's wife; that he afterwards treated such laceration in a negligent and unskillful manner; that in treating the wound he was so negligent and unskillful that he failed to properly dress the same; and that by such negligent and unskillful treatment the wound was prevented from healing.

I. At every stage of the case counsel for plaintiff raised questions as to whether there was any evidence tending to show negligence on the part of plaintiff and as to whether there was any evidence as to each of the specific forms of negligence alleged in the counter-claim submitted by the court to the jury's consideration. It would, of course, be impracticable to attempt to set out a synopsis of the testimony as collected in appellant's argument, which occupies many pages, for the purpose of showing that there was some evidence to sustain defendant's allegation as to each of the kinds of negligence submitted. It is enough for this opinion to say that there was evidence tending to show that plaintiff used forceps in effecting delivery without waiting a sufficient time to see whether by his assistance delivery could not have been effected without the use of such an instrument, and that, as the use of instruments is more likely to result in rupture involving the danger of subsequent operations, plaintiff proceeded in a negligent manner. We are justified in construing the allegation as to negligent use of instruments as covering use of instruments when in the exercise of reasonable care and judgment they should not have been used as well as the negligent use of instruments as and when they were used. If defendant's testimony is to be believed, plaintiff used defective instruments; that is, forceps tied together after they were adjusted on the head of the infant with a string, rag, or piece of silk, with the result that the fastening broke and allowed the forceps to pull loose, causing a rupture of the parts, when, if the forceps had been of a proper kind or properly fastened, such result would not have followed. The evidence tended to show that the plaintiff used an

amount of force and violence in attempting to extricate the infant from its mother's womb which was unnecessary and improper, resulting in needless injuries to the patient, including rupture of the perineum and sphincter muscle. The evidence also tended to show an improper method of treatment after the rupture occurred with the result that the injury has not been entirely repaired. We reach the conclusion that under the evidence, the court did not err in submitting the question of plaintiff's negligence to the jury nor in submitting to them each of the allegations of negligence as they were submitted.

II. The contention for the plaintiff running through the various divisions of his argument relating to the sufficiency of the evidence seems to be that if plaintiff, having the knowledge and skill required in the practice of his profession, erred only in his judgment as to whether instruments should not at the time have been used in effecting delivery, and in the method of using instruments to effect delivery, he is not liable for the reason that his duty was only to exercise reasonable care and judgment. But it was still for the jury to say under proper instructions whether, conceding plaintiff to possess the requisite knowledge and skill, he did in the particular case use the care and judgment which as such a physician he ought to have used. If he was careless or did not use the judgment which a competent physician would ordinarily use under the circumstances of the case, then he is liable in damages. These questions are to be determined, of course, in the light of expert evidence as to what a reasonable, judicious, and careful physician would do under like circumstances; but it was for the jury to say whether, in the light of the expert evidence, the plaintiff did exercise the care, skill, and judgment required. The proposition is so self-evident that citation of authority in its support is hardly necessary, but see *Smothers v. Hanks*, 34 Iowa, 286, 11 Am. Rep. 141; *Almond v. Nugent*, 34 Iowa, 300, 11 Am. Rep. 147; *Peck v. Hutchinson*, 88 Iowa, 320, 55 N. W. 511; *Whitesell v. Hill*, 101 Iowa, 629, 2 Am. Neg. Rep. 134, 70 N. W. 750, 37 L. R. A. 830; *Mucci v. Houghton*, 89 Iowa, 608, 57 N. W. 305; *Dunbald v. Thompson*, 109 Iowa, 199, 80 N. W. 324.

III. In three different instructions the jury was told in effect that, if plaintiff possessed and employed in the treatment of defendant's wife such reasonable skill and diligence as were ordinarily exercised in his profession at and in localities similar to that in which he practiced, then he was not responsible for the result of the operation. This statement of law is in accordance with the decisions of this court. *Whitesell v. Hill*, 101 Iowa, 629, 2 Am. Neg. Rep. 134, 70 N. W. 750, 37 L. R. A. 830, and cases cited therein. But in one instruction the

law was thus stated: "Negligence in this case as applied to plaintiff consists in the doing by plaintiff in the treatment of the defendant's wife, of some act that a physician and surgeon possessing and exercising the average skill and care of the medical profession in the vicinity of the defendant's residence would not ordinarily do under like circumstances." And the contention for appellant is that by this instruction the plaintiff was required to possess and exercise the care and skill usually possessed and exercised in the vicinity of the defendant's residence, rather than that usually possessed and exercised in similar localities. It may be that under some circumstances the rule as thus stated would be erroneous and prejudicial. In *Whitesell v. Hill*, *supra*, it was held that the plaintiff, suing the physician for damages and appealing on account of the insufficiency of the verdict, might properly complain of an instruction such as the one above quoted on the ground that it did not require the possession and exercise by the defendant of the skill and care usually possessed and exercised in similar localities. The distinction taken is between similar localities in general and a particular locality. But even in that case the erroneous instruction was held not to be prejudicial in view of the fact that several educated and experienced physicians of the vicinity testified, and it did not appear that they were incompetent; the presumption being that they had the average ability ordinarily possessed by men of their profession in similar localities. Now in the present case the complaint of the instruction is not on behalf of the party complaining of the malpractice, but on the part of the physician charged with such malpractice; and how it can be said that he is possibly prejudiced, in view of the fact that the vicinity was a small country town, and that the testimony relied upon as against him was principally the testimony of physicians practicing in larger places, we are unable to understand. One physician of the vicinity did testify; but there is nothing in his testimony from which it could be inferred or surmised that the standard of practice in that vicinity was higher than in similar localities; and, unless the jury might have been led to exact of plaintiff a higher standard of skill and care than required in similar localities, then plaintiff could not possibly have been prejudiced by the instruction. As supporting the view that such an instruction as above quoted, though erroneous, may be nonprejudicial in a case where the physician is appealing from a judgment against him, see *Dunbould v. Thompson*, 109 Iowa, 199, 80 N. W. 324.

In *Ferrell v. Ellis*, 129 Iowa, 614, 105 N. W. 993, an instruction on this general subject was held erroneous and prejudicial in its nature, not because it referred to the vicinity rather than similar localities,

but because it contained no limitation whatever and required the physician who appeared to possess the reasonable degree of skill and learning ordinarily exercised by members of the profession without regard to locality, and the court there calls attention to the fact that, although the locality in which the physician practiced was a mere country village too small to find place in the census enumeration, physicians testifying against him were practitioners in places of considerable size. If the complaint here was that the localities with reference to which physicians testified against this appellant were not similar to the locality in which appellant practiced, the record would give some force to the objection, but no such objection was made in the lower court, nor is it urged here; and of course it could not be urged here now for the first time.

If the instruction now complained of might be erroneous under some circumstances, it was certainly not prejudicial, as affirmatively appears from the record.

Finding no error in the record which could have been prejudicial to the appellant, the judgment is affirmed.

BRAME v. LIGHT, HEAT & WATER COMPANY, of JACKSON.

[SUPREME COURT OF MISSISSIPPI, MARCH 22, 1909.]

95 Miss. 26.

Liability for Shutting off Water Supply—Fire—Water Company.

A water company which, without notice to the consumer, shuts off for the space of thirty minutes, the supply of water from the main in front of a consumer's premises for the purpose of repairing a defective hydrant, as required by its contract with the city, is not liable for injuries to the house of the consumer by fire set by an instantaneous gas waterheater, caused by a cutting off of the water supply, where the company had no notice that such a heater had been installed in this particular house, although it was known that such heaters were in general use throughout the city, as the loss was not the proximate cause of the company's failure to give notice of its intention to shut off the supply.

Appeal by plaintiff, Lida T. Brame, from a judgment of the Circuit Court of First District, Hinds County, rendered upon a verdict directed by the court in favor of defendant in an action brought to recover damages caused by negligently shutting off the water supply. Affirmed.

For appellant—Harris & Willing and L. Brame.

For appellee—Green & Green.

FLETCHER, J. Appellant was the owner of a handsome residence situated in the city of Jackson, and had installed therein in the bathroom a device known in this record as an "instantaneous gas heater." This heater was so arranged that it was comparatively safe as long as there was a continuous flow of water, but highly dangerous if left burning after the water supply had ceased. On a certain afternoon appellant had lighted the gas and turned on the water, and then left the bathroom for a few moments. During her absence the flow of water ceased, and as a result the house was set afire and substantial damage resulted. The cessation in the flow of water was due to the

NOTE.

**Liability for Injuries or Damages
Caused by Shutting Off Water.**

No case has been found directly in point involving liability for consequential injuries or damages sustained

by the turning off of the water supply. The following cases may, however, be of service in this connection:

A city was held liable in *Stock v. City of Boston*, 149 Mass. 410, 14 Am. St. Rep. 430 (1889), for damage to plants in a greenhouse caused by a

fact that the water company, in order to repair a leaking hydrant, had cut off the water along the street in front of appellant's residence, and no notice of the intention so to do had been given. The flow of water was suspended for about half an hour. It was shown on the hearing that the water company had no notice of the fact that the heater had been installed in Mrs. Brame's residence. From a peremptory instruction in appellee's favor, Mrs. Brame appeals.

Several reasons are urged here in support of the action of the circuit court. It is said that the liability of the company towards its patrons must be measured by the terms and stipulations of the contract between the company and the city. This contract provides in effect that the water company shall at all times maintain a sufficient supply of water, except when suspended for necessary repairs. The contract further provides that the fire hydrants mentioned shall be kept in good order, and it is made the duty of the company to repair such hydrants forthwith, when notified that they are out of repair. It being shown in the instant case that a particular hydrant needed repairing, we are told that the contract with the city permitted, and, indeed, demanded, that the water should be cut off for a short time, since the hydrant could not otherwise be repaired. It is argued that the citizen, contracting with the company for water and joining his service pipe to the mains constructed by the company, has his rights determined by the contract with the city, and is therefore in no position to complain if there has been a temporary suspension of water service, due to the making of necessary repairs. On the other hand, it is said that this water company, under its franchise, contracts, and mode of operation, is a public service corporation, charged with certain obligations to the public, and especially its patrons, and that it must use all necessary and reasonable precautions, in conducting its business, not to so operate it as to lead to injury; that these instantaneous heaters are in common use in the city of Jackson, of which fact the company either was or should have been informed; that the company is charged with knowledge of the fact that it will lead to dis-

stoppage of the flow of water in the supply pipe by reason of the negligent exposure of that pipe to the cold so that the water froze therein. The exposure of the pipe being the proximate cause of the damage, the court held the city to be liable in tort, although the owner of the plants had a contract with the city for his supply.

And in a somewhat analogous case,

it was held that a village was liable for damage to a crop of lettuce growing in a greenhouse which was frozen by reason of its failure to supply water with which to make steam to heat the greenhouse, due to a leak in the stand-pipe. *Watson v. Inhabitants of Needham*, 161 Mass. 404, 24 L. B. A. 287 (1894).

astrous conflagrations if the water is cut off; that, knowing this, notice should have been given of such intention, and the failure to do so is an actionable tort. Hence it is argued that the contract with the city is quite outside of this case.

We are not prepared to gainsay the soundness of appellant's contention on this phase of the case; but we do say that, while the contract may not contain the full measure of appellant's rights and appellee's duties, yet it may be looked to as valuable in determining whether the company has in this case been negligent. For this contract obligates the company to keep the fire hydrants in repair and permits a suspension of the water flow for this purpose. It can, therefore, not be argued that the company was negligent in cutting off the water for thirty minutes. The wrong must consist rather in failing to notify users of the particular device here involved. This narrows the compass of the inquiry to this: Was it actionable negligence to suspend the flow without notifying Mrs. Brame? Liability for tort is predicated upon the view that the tort-feasor must be held liable for the natural consequences that will probably result from this wrongful act. Keeping this elementary truism in mind, we can see the importance of the admitted fact that the water company had no knowledge that this heater had been installed in this particular residence; for, if knowledge of the existence of such a fixture was wanting, how could the company reasonably anticipate that a temporary cessation of the water flow would lead to disastrous consequences? The only possible method of avoiding this obvious obstacle to recovery is to say that it was the duty of the water company to keep abreast with the march of modern progress, and that it must be charged with knowledge of the fact that these heaters had come into general use; that, knowing that many citizens had installed these devices, it was the duty of the water company to search out these persons and notify them of the intention to shut off the water, or that some system of signaling or other manner of giving notice should have been adopted. To our mind this view imposes too high a duty upon the company. It calls for a degree of vigilance far beyond what may be characterized as ordinary or reasonable. It would charge the company with notice of every improvement which the fruitful ingenuity of an inventive age might devise, provided it depended in any degree upon the flow of water. To hold the company liable in this case, we must conclude that the company might reasonably have anticipated, first, that Mrs. Brame had one of these instantaneous heaters; second, that she would undertake its operation during the particular half hour that the water was shut off; third, that it would be left unguarded while in operation; and, fourth,

that the cessation in the flow would cause a fire. We think the chain of causation is too lengthy here to connect the loss with the failure to give notice.

We cannot see the relevancy of the cases cited by appellant. Reliance is had upon the case of *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 1 Am. Neg. Rep. 222, 46 N. E. 17, 36 L. R. A. 535. This case is authority for the proposition that a failure to supply gas is a tort; but it deals with the primary duty of the public service corporation not to breach its contract to supply in a reasonable manner its patrons with fuel, known to be for heating purposes. But here the damage resulted, not proximately through the failure of the company to supply water, but because of the interposition of an unfamiliar mechanism, the existence of which was unknown to the company. The case of *Guardian, etc., Trust Co. v. Fisher*, 200 U. S. 57, 26 Sup. Ct. 186, 50 L. Ed. 367, does no more than decide that, if damages are recoverable for a failure of a water company to supply water, such damages are properly recovered in an action of tort. The somewhat familiar green house cases referred to have their origin in special contracts to furnish a supply of water for particular purposes, well known to the water company. We are without direct precedent to guide us; but, applying familiar and general principles to the facts before us, we are constrained to uphold the action of the lower court.

We have not thought it necessary to discuss the question of contributory negligence, based either upon the failure of the appellant to watch the heater or upon the alleged defective construction of the vent pipe. Affirmed.

SCHIER et al. v. WEHNER.

[COURT OF APPEALS OF MARYLAND, DECEMBER 6, 1911.]

116 Md. 553.

1. Negligence—Injury to Child—Evidence.

Proof that a child started to cross a street in front of a team approaching at a moderate pace, and was injured, does not authorize an inference of negligence in the absence of evidence as to how the accident occurred.

2. Negligence—Presumption—Injury to Child.

The fact that the driver of a wagon driven along the street at a moderate pace, jumped off and picked up a child lying in the street, alleged to have been run over by him, and after placing it in its mother's arms drove rapidly away, is not an admission of negligence on his part or sufficient to afford a presumption of negligence.

Appeal by defendant from a judgment of the Baltimore City Court, rendered in favor of plaintiff in an action brought to recover damages for injuries alleged to have been sustained by being run over by a wagon. Reversed.

For appellants—John E. Semmes, Jr. and Chester F. Morrow.

For appellee—Lee S. Meyer.

Argued before BOYD, C. J., and PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

STOCKBRIDGE, J. This is a suit, instituted by Esther Wehner, an infant, by her father and next friend, John J. Wehner, to recover damages for injuries received on October 31, 1910, from being run over by a wagon belonging to the defendants Oscar B. Schier and Carl F. Schier partners in the milk business, conducting their occupation under the name of the "Hygeia Dairy," while the wagon was being driven by an employee of the firm, named Carl Schmidt. The record contains but two bills of exceptions, of which the first was reserved to the rulings of the trial court on the prayers, and the second was to the action of the court in permitting, at the time when the first bill of

NOTE.

On the subject of Contributory and Imputed Negligence, Sui Generis, and Assumption of Risk as Applied to

Children, see note in 15 Am. Neg. Rep. 684.

And on the subject of Presumption of Negligence, see notes in 5 Am. Neg. Rep. 77; 8 Am. Neg. Rep. 298.

exceptions was signed, certain physical measurements of the driver Carl Schmidt, to be incorporated in the record. The appellants concede that this second bill does not raise any ruling which could be regarded as reversible error; and this admission makes consideration of this bill unnecessary.

At the trial, the only evidence offered was that adduced on behalf of the plaintiff. At its conclusion, the plaintiff presented two prayers, of which the first was directed to the right of the plaintiff to recover, and the second laid down the rule for the measure of damages. The defendants likewise offered two prayers, by the first of which the court was asked to instruct the jury that there was no evidence in the case legally sufficient to entitle the plaintiff to recover, and the second was the usual prayer on contributory negligence. The trial court granted both of the plaintiff's prayers, and refused both of the defendants'.

Since the first prayer offered by the defendants amounted to a demurrer to the evidence, it is necessary to consider the testimony offered, to determine the correctness of the ruling of the court upon the first prayers of the plaintiff and defendants, respectively, bearing in mind that the essential element requisite for a recovery is some act of negligence, either of commission or omission, on the part of the defendants or their servant.

On the morning of the day named, the infant plaintiff, who was a child just past her fifth birthday, was sent by her mother to a grocery store on the opposite side of Streeper street from her home to get some soap. Having obtained the soap, the little girl started to return. At the same time, the dairy wagon of the defendants, driven by their servant, Schmidt, was moving north on Streeper street just above Orleans street, or somewhere between 35 and 60 feet distant from where the child was about to cross. Streeper street, at this point, is about 25 feet in width, and paved with vitrified brick. The next that was seen of the child she was lying, face down, with her waist line distant about three feet from the curb, on the side of the street nearest her home, and the wagon had passed on to a point some 14 or 15 feet beyond where the child was lying.

None of the witnesses who testified saw the child actually run over by the wagon of the defendants; and therefore none of them is able to say precisely how the accident did take place. While, of course, it is not an absolute essential to establish negligence that there should have been an eyewitness to the accident (*United Railways v. Cloman*, 107 Md. 688, 69 Atl. 379), it is necessary that there be some evidence indicative of negligence in the circumstances surrounding an occur-

rence, either antecedent to or coincident with the happening of the accident. Thus, in the case of the *United Railways v. Carneal*, 110 Md. 211, 72 Atl. 771, where a child of three years was struck by an electric car, there was positive evidence adduced by the plaintiff to the effect that the motorman of the car was looking at the buildings on the side of the street, and ran his car past, without seeing one would-be passenger; and in the case of the *City Passenger Railways v. McDonnell*, 43 Md. 534, where a child of two years was run over by a horse car, there was evidence that the attention of the driver was occupied by a young lady in the doorway of a house on the opposite side of the street from that from which the child approached; and in the case of *McMahon v. Northern Central Ry. Co.*, 39 Md. 438, 12 Am. Neg. Cas. 33n, in which a child between five and six years of age was run over, it affirmatively appeared that a string of freight cars which had been stationary for some five hours was started without a signal or warning of any kind. In each of these cases, there was positive evidence of negligence, independent of the accident itself.

Let us compare the facts in the cases cited with the case under consideration. The witness Mamie Blessing testified to seeing the wagon coming up the street, and that the horse was trotting; but she last saw the wagon just after it had passed Orleans street, distant some 60 feet from the point of the accident, and turning to her work did not see it again until after the child had been run over. The witness Grover testified that, as he turned into Streeper street from Orleans street he saw the wagon coming up Streeper street, and that as he turned the corner the wagon was about in the middle of Orleans street; that "the driver was not driving fast, nor was he driving slow;" that "he was not walking;" but, according to the further testimony of the witness, he had had time to walk up Streeper street from Orleans to the store where the plaintiff had bought the soap, and enter the store, before the plaintiff had left the store to return to her home. From this evidence, it is impossible to conclude that the driver of the wagon was proceeding at an improper rate of speed; and neither of these witnesses, nor any of the other witnesses in the case, give any evidence tending to show that the driver was not giving proper attention to his team as he drove up the street, or that he was not in a position to see, or did not see, persons on or crossing the street, and whether they were in a position of danger, so as to impose upon him the duty of stopping. What does appear from the evidence, and all that appears, is that, while the servant of the defendants was proceeding up the street, the plaintiff started to cross; that she had

crossed over at least 20 feet of the space between curb and curb, and passed in front of the approaching team; but whether she was struck and knocked down by the horse, or whether becoming frightened, she endeavored to spring forward, slipped, and fell underneath the vehicle, or how the accident in fact occurred, there is no evidence whatever. It has been frequently said in this State that the bare fact that an injury has happened, of itself and apart from all surrounding circumstances, cannot authorize an inference that it was caused by negligence. To assume that is to assume the very fact required to be proven (*Joyce v. Flannigan*, 111 Md. 499, 74 Atl. 818); or, as was said in the case of *Balt. & O. R. Co. v. Black*, 107 Md. 666, 69 Atl. 448: "All that is certain is that the plaintiff was injured in some way; and that the plaintiff asks that the jury be allowed, in the absence of all explanatory evidence, to infer that some act of a negligent character for which the defendants are responsible caused the injury sustained. No case has gone to that extent; and no known principle can be cited to sustain such a position."

It has been earnestly argued on behalf of the plaintiff that the conduct of the driver immediately following the accident amounted to an admission of negligence on his part, or was at least sufficient to afford a presumption of negligence. That conduct is described as follows by the witness Mamie Blessing: "I seen the driver jump off the wagon before the wagon had stopped, and he picked the child up; and I seen him take her to the cellar window, and then Mrs. Wehner came and took the child, and he got on the wagon. And I seen him make a motion like this (indicating) that he was scared, and Mrs. Wehner took the child and ran after him; but he flew up the street in the wagon." And upon re-examination the witness again stated that the driver jumped from the wagon to return to the child before it had come to a stop. The witness Belle Kernan testified that she "only saw the child in its position in its mother's arms and the man running to his wagon, and the wagon was still going, and some one called my attention to it." She further testified that she went over to the driver, and said to him: "Don't go away; probably you can help her to the hospital with the child. And he said 'Oh, yes; but—' and then he went on." It is not a question whether the driver showed proper consideration, but whether his conduct amounted to an admission of negligence upon his part. Schmidt knew, when he jumped from his wagon, that he had run over a child—how serious might be the injuries he could not know—and it was but natural that he should have been excited; and his conduct should not be judged by the same standard as would be deliberate acts, done when there

was nothing to arouse unusual emotions. His conduct was rather that of a man nervously excited than of one callously indifferent, or admitting a dereliction on his part. Had he been intent on escaping, he would hardly have jumped from his moving wagon to pick up the unfortunate child, and hold her until he could place it in the mother's arms. This is not a case in which the doctrine of *res ipsa loquitur* can be applied; for it does not fall within either of the classes coming under the legal principle as enunciated in *Strasburger v. Vogel*, 103 Md. 89, 20 Am. Neg. Rep. 99, 63 Atl. 202.

The record is largely made up of the medical testimony as to the nature and extent of the plaintiff's injuries and the probabilities or the reverse, of their leaving permanent effects; but until some evidence is adduced tending to show the negligence of the servant of the defendants the medical testimony is immaterial. In the foregoing statement the endeavor has been made to set forth the strongest evidence contained in the record which could in any way tend to show the negligence of the driver Schmidt, or the contributory negligence of the plaintiff, and as to both of these the proof is strangely lacking; and to mulct a defendant in damages without proving what has caused the accident, is to punish him, not for any wrong he has done, or for any duty he has omitted, but because the plaintiff cannot prove what she wants to find out. *So. Balt. Car Works v. Schafer*, 96 Md. 105, 13 Am. Neg. Rep. 78, 531 Atl. 665, 94 Am. St. Rep. 560.

It follows, therefore, that the action of the trial court was correct in refusing the second prayer of the defendants; but it also follows that the first prayer of the plaintiff should have been refused, and that the first prayer of the defendants should have been granted. The judgment below will therefore be reversed, without a new trial.

Judgment reversed, without a new trial; costs to the appellants.

BURKE and URNER, JJ., dissent.

BLOSSOM OIL & COTTON CO. v. POTEET.

[SUPREME COURT OF TEXAS, APRIL 19, 1911.]

— Tex. —, 136 S. W. 432.

1. Negligence—Attractive Place—Infant.

A child carried into a cotton seed oil mill by her mother without invitation, express or implied, and wholly as a matter of convenience, when she went to the mill to carry dinner to her husband who worked therein, cannot be said to have been attracted there because it appealed to her childish curiosity and interest.

2. Negligence—Injuries—Infant—Licensee.

A company operating a cotton seed oil mill is not liable for injuries to a child, about 4½ years old, caused by stepping into an uncovered seed conveyer when she followed her father as he hurried to the aid of his wife, about whom a large quantity of seed had slid, while she was engaged in doing her husband's work while he was eating the dinner which she and the child had brought to him.

3. Negligence—Millowner—Care Required—Infant—Injury.

A mother who, over the protest of the owner of a cotton seed oil mill, brings her child into the mill where the father is employed as day laborer, and who also has been told not to allow the child to enter, cannot thereby impose the duty on the millowner to watch over and care for the infant to see that she does not voluntarily injure herself.

In the error to the Court of Civil Appeals of the Sixth Supreme Judicial District (127 S. W. 240), to review a judgment rendered in favor of plaintiff, Gracie Poteet, in an action brought against the Blossom Oil and Cotton Company to recover for personal injuries. Reversed.

For plaintiff in error—Moore & Park.

For defendant in error—Burdett & Connor, and J. S. Patrick.

RAMSEY, J. This case presents a question at once novel, difficult, and important. That it may be understood, we make the following liberal quotation from the opinion of the Court of Civil Appeals,

NOTE.

On the subject of Liability for Injuries to Children Caused by Dangerous Attractions, see note in 21 Am. Neg. Rep. 293.

And on the Liability of Railroad

Companies for Accidents to Children on Turntables, see note in 9 Am. Neg. Rep. 611-616.

And for cases relating to Injuries to Children on Dangerous and Defective Premises, see note in 12 Am. Neg. Rep. 508-513.

which both outlines the contentions and claims of the respective parties, and also gives in some detail and particularity the facts on which a recovery was by that court upheld:

"Appellant operated a cotton seed oil mill. Its seedhouse was situated about 50 feet from its main building, and was 60 feet wide north and south by 200 feet long east and west. Near the center of the seedhouse, along the floor thereof for a distance of about 100 feet from its west end, appellant had constructed a box about 12 inches in height and about 10 inches in width. In this box was a spiral or screw-shaped piece of iron or steel about nine inches in diameter, which, revolving, conveyed seed placed in the box to the cleaning machine, and then to the mill in the main building. The covering for the box was in sections—each five feet in length, it seems—and was so arranged that desired openings through which to feed the iron conveyor inside the box could be made, leaving other portions of the box covered. Besides the conveyor just referred to and others, there was in the seedroom a sand screen and shaker and fan, three elevators, and shafting, belting, and pulleys, located near the floor and uncased. There also was in the room a quantity of cotton seed. March 8, 1907, appellee Gracie Poteet, then about 4½ years old, stepped into the box described above, while the iron conveyor referred to was revolving therein, and as a result her left foot was cut off, and her left leg was so torn, crushed, and injured as to make it necessary to amputate same about midway between her knee and hip. In her petition appellee, who sued by her next friend, after alleging that the seedroom, because of the machinery and cotton seed therein, was an attractive place to children of her age, and that she had been invited and permitted by appellant's employee in charge of the room to go into the same, further alleged: That 'she was a small child, about 4½ years of age, too young and inexperienced to understand or appreciate the dangers to her of being injured while in defendant's aforesaid seedroom, and about its machinery therein. On that day plaintiff was carried by her mother, the wife of the aforesaid B. F. Poteet, to defendant's said oil mill plant and into the seedroom where her father was at work in charge and control of said seedroom in defendant's employ. That the purpose of her visit, on that occasion, as it had been on many days prior thereto, was to carry her father's dinner for him to eat, and that her mother might perform his work while he was eating the same. While there plaintiff was permitted to wander about and over said seedroom among defendant's machinery, and on this occasion had passed to the opposite side of the seed conveyor from where her mother was shoveling

seed into the conveyor, and performing the work of B. F. Poteet, an employee of defendant, and said B. F. Poteet knew where she was, and what she was doing. That the cotton seed were piled high where plaintiff's mother was shovelling them into the conveyor, and suddenly they caved in on her up to her waist, and she called aloud to her husband to run to her assistance and to help her prevent the conveyor from choking up, and plaintiff hearing her and seeing her father run to her mother, and not appreciating the danger to herself in doing so, ran after her father, and attempted to pass over the seed conveyor, and stepped upon what appeared to be a solid foundation, over the same, made by a plank placed on the top of said conveyor, when suddenly her foot passed through an opening in said plank which had been obscured by an accumulation of cotton seed, and was caught by the large spiral-shaped steel piece of machinery, or screw, in said conveyor, and was injured' as complained of. She further alleged that at the time when she 'ran after her father to her mother and towards said hole in said seed conveyor said B. F. Poteet knew of the dangerous condition of the same, and that said hole was in said conveyor, and that it was deceptively covered with seed, and also knew that plaintiff was following him towards said hole, and could by use of proper care have prevented her from stepping into said hole, but negligently failed to use proper care to prevent her from stepping into it.' Appellee further alleged that the injury suffered by her was the result of appellant's negligence in failing to properly guard and cover the conveyor, in failing to keep cotton seed removed from it so as to expose the opening she stepped into, in permitting her to be and remain in the seedroom and in failing while she was there to use proper care to prevent injury to her. In its answer, after excepting to the petition and denying generally the allegations therein, appellant specially denied that appellee was in its seedroom by its invitation or consent, or by the invitation or consent of any of its employees authorized to give same; denied that Poteet at the time was in charge of the seedroom in the sense that he had authority to invite appellee to enter the seedroom, or permit her to remain there; denied that its machinery, etc., was attractive to children, or that its attractiveness caused appellee to be in its seedroom, and denied that it had been negligent in any particular in the construction of the seed conveyor, etc.; and averred that said seed conveyor had been constructed and maintained with due care and skill, and was not dangerous to those whose duties required them to be in the seedroom, that appellee had been repeatedly warned not to enter said seedroom, and that her mother and father had been repeatedly instructed not to

bring or permit her to be in said room, and that the injury she suffered was an accident for which it was not responsible, and was caused solely by the negligence of appellee's father and mother in bringing her to and permitting her to remain in the seedroom, and failing while she was there to properly look after and care for her.

"From the uncontradicted testimony it appeared that B. F. Poteet, appellee's father, was an employee of appellant, charged with the duty to feed the conveyor in the seedroom; that at about 12 o'clock on the day she was injured appellee accompanied her mother, who went to the seedroom to carry to her husband his dinner, and while he was eating same, to take his place in feeding the conveyor; that while Poteet was engaged in eating his dinner, and Mrs. Poteet was engaged in shoveling cotton seed from a mass of seed piled high on the floor, the seed began to slide down and to cover her, and choke the conveyor she was feeding; that thereupon she called to her husband to come and assist her; that at that time Poteet and appellee were sitting down, eating about 20 feet from the conveyor, near or against the north wall of the building; that Poteet went hurriedly to his wife, crossing over the conveyor, and was followed by appellee, and that appellee, in attempting to cross over the box containing the conveyor, stepped into same through an opening therein, and was injured as alleged. It further appeared that at once after appellee got into the seedroom, and until her father began to eat his dinner, she played around in the room on or with the cotton seed. As to the circumstances immediately surrounding the accident, Poteet testified as follows: 'I took my dinner and went over next to the north wall and sat down, and Gracie got up, and said, 'Daddie, I believe I will eat dinner with you.' And she set down, taken out some meat and bread, and went to eating, and the seed where my wife was feeding was piled up as high as this ceiling [indicating ceiling in courtroom], and she had dug out through the seed, she had dug out until the seed slid down around her waist, and she halloed to me, for me to help her; and, when I started, Gracie started and said, 'Daddy, I am coming too.' I never thought about the child getting hurt, and run to my wife. I was thinking about my wife and seed sliding in on her, and the next thing I knew I got on top of the conveyor, and the next thing I knew Gracie was at my heels; and the next thing Gracie halloed, 'Mamma! Mamma!' and I turned around and seen she was fastened, and it scared me until I didn't know what to do, but all I thought of was running and throwing the belt, and run something like 100 feet, kicked the belt off, and stopped the machinery.' "

It reasonably appears from this statement, and is rendered more

certain by the evidence, that the child Gracie was not at the mill at the time she received her injuries because allured and attracted there by reason of the fact that it appealed to her childish curiosity and interest, but that, wholly aside from any attractive quality of the place, she was carried there by her mother without invitation, express or implied, wholly as a matter of convenience or voluntary choice on her part. We may therefore at once dismiss the view of the attractiveness of the place as having no proper place in the case, and as furnishing of itself no basis of recovery.

There is some evidence that, after her arrival at the mill, Gracie played for a short time around in it, but again the testimony of her father renders it clear that, just before she was hurt, she was quite a distance from any machinery, and in a position of safety. We think, therefore, the fact that she had at any time prior to assuming a position of safety been playing about or around in the mill becomes a fact of absolutely no consequence. It is not contended, nor do the facts even tend to show, that she was injured by the act of negligence of any servant, agent, or employee of the oil mill. The most that can be claimed is, that her father, a servant of the mill, neglected the duty which it is claimed the law imposed on him of using reasonable care to prevent the injury.

Nor can it be successfully claimed that the machinery of the mill was as to her defective or that the company as to her was liable by reason of the condition of such machinery and appliances. In the case of *City of Greenville v. Pitts*, 102 Tex. 1, 107 S. W. 50, 14 L. R. A. (N. S.) 979, 132 Am. St. Rep. 843, it was held that, while the proprietor of an electric light system owed the duty to properly insulate its wires placed on the roof of a private building for the protection of such persons as had a right to go on same, such duty did not extend to trespassers or mere licensees upon the premises, and that they could not recover for injuries due to such defective insulation. Here Gracie was, at best, a mere licensee, and could not recover merely because of the condition of the machinery. Therefore the question comes to this, as submitted by plaintiff in error and copied into the opinion of the Court of Civil Appeals on motion for rehearing (124 S. W. 244): "Under the evidence exhibited by the record, is it possible that the court can hold that the mother, over the protest of the mill management, can bring her child into the mill where the father is employed as a day laborer, and who also has been told not to allow the child to enter, and thereby impose the duty on the millowner to watch over and care for her to see that she does not voluntarily injure herself?"

This is, as we conceive, the issue in the case and on its proper determination must rest the rights of the parties.

We think that ordinarily, in reason and from consideration of humanity, the rule announced by this court, that in analogy to the doctrine of discovered peril when an employee in charge of dangerous machinery sees a child of tender and immature age and discretion intruding into such place of danger it becomes the duty of such servant to take steps for the protection of such child, should be followed and affirmed. This rule, however, proceeds on the principle that such child is incapable of protecting itself, and that the owner of such building and place where such child has come cannot in indifference and unconcern permit such child, so unprotected and therefore most subject to injury, to be hurt. The fact of the unprotected condition of the child is a view of the case never to be lost sight of. But we have been cited to no case or other authority, and we have in our own research found none, which sustains this recovery. Indeed, there is an almost utter dearth of authority on the question. There is in the case of *Norman v. Bartholomew*, 104 Ill. App. 667, an expression by that court which in effect supports the contention of the plaintiff in error. That was a suit by Homer Bartholomew, suing by his mother as next friend, against Norman for damages for injuries resulting in the loss of his arm. The pleadings were quite voluminous and too lengthy to set out here, but among other things it was averred that Norman was negligent in permitting the plaintiff, who was some 8½ years old, to be and remain in and about his dangerous machinery. There was evidence that plaintiff's mother called him into the room in or near which he was injured. There are some expressions in this opinion which we would not sanction, but the following paragraph in same seems both sound and in point: "It seems manifest to us that it would be absurd to hold that the appellant should have warned the appellee of the dangerous character of the mangle under the circumstances disclosed by this record, when the mother of the appellee under whose special care he was at the time he was injured, with full knowledge of the character of the mangle, had voluntarily required her son, in order to shield him from a quarrel with another boy, to remain near to the mangle, thus showing that she did not regard the mangle as being so dangerous, and yet inviting to the childish instinct of her son, as to require her to warn him of its dangers, or to refrain from causing him to sit near to it unrestricted."

But, independent of authority, it seems to us, in legal reason, there ought not in this case to be a recovery. All efforts to impose on Poteet, the employee, a duty at variance with his duty as a father, in respect

merely to a failure to take steps to secure the protection and safety of his child, and to hold his employer liable for such failure, is, to our minds, merely playing with words and a confusion of terms. Undoubtedly the law imposed on him the duty to protect his child, whether he is master or servant. To discharge this duty he was under the strongest obligations which can affect or move any man. To this legal duty was added the incentive of love and the obligations of pater-
 nity. He might cease to be an employee. He could never cease to be a father while he had life and being. If we could assume that the managing officer of plaintiff in error had seen the child in the mill with her father and at the time in a place of safety as she was, could it not be assumed, and ought it not to be held, that the company might rely on the natural affection common to all humanity, an affection which money cannot buy nor time wither, as to dangers known to the father, to take proper and effective steps to secure such child from injury? In order to hold the oil mill liable, there must be evidence of negligence, and that its conduct in the circumstances appearing in the case was violative of some duty which the law imposed on it. So situated, might it not trust to the protection which both law and duty would assure? The duty to protect the child in the possession and under the immediate control of both the father and mother is both legal and moral and is continuing and affirmative, and, at least until it is known that they have abandoned the child and its danger becomes apparent, the master is not liable. To hold otherwise would, as we believe, be at variance with correct legal principles and out of harmony with all that moves and controls men in the affairs of life. On the other hand, the conclusion to which we have arrived attained, what should always be the supreme and ultimate end of the law—justice, of which it may be truly said that “the merchandise of it is better than the merchandise of silver and the gain thereof than fine gold.” “Ye cannot serve two masters” is not only the declaration of Holy Writ, but as well the experience of all the ages. The father could not in the circumstances of this case, as we believe, be held to abdicate the high duties of father to the end and with the effect of stamping his conduct as mere employee with such negligence as to render his employer liable.

If these views are sound, it logically results that defendant in error is not entitled to recover, and that the judgment of the Court of Civil Appeals should be reversed and judgment here rendered for plaintiff in error; and it is so ordered.

HILL v. DAY et al.

[SUPREME JUDICIAL COURT OF MAINE, NOVEMBER 11, 1911.]

— Me. —, 81 Atl. 581.

1. Landlord and Tenant—Sub-tenant—Duty as to Safety of Premises.

A landlord is under no greater duty to a sub-tenant in respect to the safety of the demised premises than to the tenant.

2. Landlord and Tenant—Warranty as to Fitness of Premises—Repairs.

The lessor of a dwelling house does not impliedly warrant that the premises are reasonably fit for use, and, in absence of an agreement, is not bound to make repairs.

3. Landlord and Tenant—Repairs—Sub-tenant—Injuries.

Mere neglect by a landlord to keep the leased premises in repair, does not, in the absence of fraud, render him liable for injuries sustained by a sub-tenant caused by the fall of plaster from the ceiling of a room.

4. Landlord and Tenant—Defective Conditions—Notices.

The duty of a landlord in respect to informing a tenant of any defects or dangerous conditions in the leased premises must be determined as of the time he let the property, and no subsequent knowledge of a defective condition will create that duty.

5. Landlord and Tenant—Misfeasance—Repairs.

Misfeasance of a landlord in making repairs, gratuitously undertaken, imposes no liability in favor of a sub-tenant, injured by his negligence, but who had no knowledge of such undertaking.

6. Evidence—Agency—Words and Acts.

Agency cannot be established by proof of the words and acts of the alleged agent.

7. Appeal—Exceptions—Waiver.

Exceptions not argued in exceptant's brief are deemed waived.

On exceptions to order of nonsuit in an action brought to recover damages for personal injuries alleged to have been caused by the falling of plastering upon plaintiff from the ceiling in a house owned by defendant. Exceptions overruled.

For plaintiff—Mathews & Stevens.

NOTE.

On the subject of Liability of Landlord or Tenant for Dangerous and Defective Condition of Premises, see notes

in 1 Am. Neg. Rep. 84; 4 Am. Neg. Rep. 183, 186; 7 Am. Neg. Rep. 260, 437, 608; 8 Am. Neg. Rep. 6; 9 Am. Neg. Rep. 560, 566; 11 Am. Neg. Rep. 315; 16 Am. Neg. Rep. 461.

For defendant Day—John P. Deering.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, BIRD and HALEY, JJ.

STATEMENT OF FACTS: Action on the case to recover damages for personal injuries alleged to have been sustained by the plaintiff, and caused by the falling of plastering upon the plaintiff from the ceiling in the kitchen of a certain dwelling house owned by the defendant Day. Plea, the general issue. At the conclusion of the plaintiff's evidence the presiding justice ordered a nonsuit. To this ruling and certain rulings excluding certain testimony the plaintiff excepted.

KING, J. This case comes up on exceptions to an order of nonsuit, and other exceptions by plaintiff to the exclusion of testimony. The action is to recover damages for personal injuries alleged to have been sustained by the falling of plastering upon the plaintiff from the ceiling in the kitchen of a dwelling house owned by the defendant Day.

Exceptions to the order of nonsuit.

The declaration alleges that the house was occupied by Clementine R. Foss (one of the defendants) under a contract with Day, and used by her as a dwelling house and for the letting of rooms. No evidence, however, was introduced as to any contract of tenancy between Mr. Day and Mrs. Foss. The plaintiff testified that she hired of Mrs. Foss a front room, with the privilege of using the kitchen for passing through to the back yard, and for some cooking and light housekeeping, and began her occupancy on November 10, 1908. On the 20th of November the plaintiff, having passed from the back yard through the kitchen with some clothes, came back into the kitchen and shut a door—presumably the door leading from the kitchen to the yard—whereupon a portion of the ceiling plastering fell upon her, causing the injuries complained of.

If it be assumed that the relation of landlord and tenant existed between Mr. Day and Mrs. Foss with respect to the house in question, as alleged in the declaration, the fact that the plaintiff was using the kitchen by permission of Mrs. Foss would create no greater liability on the part of Day to the plaintiff than that which he was under to Mrs. Foss by virtue of the relation of landlord and tenant between them.

The law is well settled in this State that in the letting of a dwelling house there is no implied warranty that it is reasonably fit for use, and no obligation on the part of the landlord to make repairs on the leased premises, unless he has made an express valid agreement to do

so; but the tenant, on the principle of *caveat emptor*, and in the absence of any fraud on the part of the landlord, takes the property in the actual condition in which he finds it. *Bennett v. Sullivan*, 100 Me. 118, 18 Am. Neg. Rep. 428, 60 Atl. 886; *McKenzie v. Cheetham*, 83 Me. 548, 22 Atl. 469; *Libbey v. Tolford*, 48 Me. 316, 77 Am. Dec. 229; *Whitmore v. Pulp Co.*, 91 Me. 297, 39 Atl. 1032, 40 L. R. A. 377, 64 Am. St. Rep. 229.

In the absence of any evidence in this case, as to the terms of the tenancy of Mrs. Foss, it must be held that the defendant Day was under no obligation to keep the premises in question in repair, and that Mrs. Foss, and the plaintiff occupying by her permission, there being no fraud on the part of Day, took the house in the condition in which it was for better or worse. *Gregor v. Cady*, 82 Me. 136, 19 Atl. 108, 17 Am. St. Rep. 466. Accordingly the defendant Day was not liable to the plaintiff for her injuries if they resulted from neglect to keep the house in repair.

But the plaintiff claims that the defendant Day is liable to her on the ground that the insecure condition of the plastering and consequent danger that it might fall was a secret defect—a trap—in the premises, known to Mr. Day, and the existence of which he did not communicate to his tenant, Mrs. Foss, and of which she had no knowledge. This claim is not supported by the facts and circumstances in evidence.

We need not here decide the question whether, if at the time Day let the house to Mrs. Foss there was an existing danger that the plastering might fall and he had knowledge of it, it was his legal duty to inform her of it, because there is no evidence that any such danger existed when the tenancy of Mrs. Foss began, or, if it did then exist, that Day had any knowledge of it which he did not communicate to her, or that she did not otherwise have knowledge of it.

As has been noted, there is no evidence in the case relating to Mrs. Foss' tenancy. It does not appear how long she had been in occupation of the premises. It does appear, however, by the testimony of Judith K. Young, that when she began occupying some rooms in the house November 1, 1906—two years before the plaintiff's injuries—Mrs. Foss was then in occupation of the house. Day's duty and freedom from duty to Mrs. Foss, and consequently to the plaintiff, in respect to communicating information of any defects or dangerous conditions in the leased premises, must be determined as of the time he let the property to Mrs. Foss. If it does not appear that he had knowledge of the defect at that time, then no such duty is shown. If he then owed no such duty to his tenant, no subsequent knowledge on

his part of a defective condition of the premises would create that duty. The only evidence tending to show that Day had knowledge of the condition of the plastering before the plaintiff's injuries is in the testimony of Judith K. Young to the effect that, while she occupied rooms in this house from November 1, 1906, to April, 1907, she called Day's attention to a place in the kitchen ceiling, near where the plastering fell upon plaintiff, where there was a leak, and from which some plastering had then fallen. But that was after the beginning of Mrs. Foss' tenancy, for the witness testified that Mrs. Foss occupied the tenement at the time she went there and that she "hired with her."

Further, the plaintiff alleged in her declaration "that the defendant Day had undertaken to remedy said dangerous condition and had done the work so unskillfully and incompletely as not to make said kitchen safe for occupancy." In support of this allegation the plaintiff testified that about a week or ten days after her accident Mr. Day was at the house, and Mrs. Foss called his attention to the leak in the kitchen, which presumably caused the plastering to fall, and that he said he had been up there to work on the roof with men, and Mrs. Foss replied, "You haven't stopped the leak yet." The plaintiff further testified that no work was done on the roof from the time of her injuries to the time of this conversation.

Assuming that this testimony would justify an inference that Day had, prior to the time of the plaintiff's injuries, undertaken to repair the leak in the roof, and, in the language of the declaration "had done the work so unskillfully and incompletely as not to make said kitchen safe for occupancy," that inference alone would not authorize the application of the principle which the plaintiff here invokes.

That principle is thus expressed in *Gregor v. Cady*, 82 Me. 137, 19 Atl. 108, 17 Am. St. Rep. 466: "And although the lessor's attention, after possession taken by the lessee, was called by the latter to the rickety condition of a portion of the premises, and he thereupon agreed to repair it, still he was under no obligation to fulfill his promise. But when, upon the request of the lessee, the lessor gratuitously undertook to make the repairs, and negligently and unskillfully performed the work, whereby the lessee was subsequently injured, the lessor became liable by reason of his misfeasance, provided he undertook to repair the particular part of the premises to which his attention was called and where the injury occurred." "If a party makes a gratuitous engagement, and actually enters upon the execution of the business, and does it amiss through the want of due care, by which damage ensues to the other party, an action will lie for this

misfeasance." 2 Kent's Com. 750. "The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." Note in *Coggs v. Bernard*, Smith's Lead. Cases (6th Am. Ed.) 335 [2 Ld. Raym. 909, 1 Am. Neg. Cas. 948]. It will be seen that this principle is not applicable to the case at bar. If Day undertook to repair the roof before the accident to the plaintiff there is no evidence that the plaintiff was a party to his gratuitous undertaking, or had any knowledge of it before her accident. To give the plaintiff a right of action against Day for misfeasance on his part, if he did actually enter upon the gratuitous service of repairing the roof, it must be proved at least that she had knowledge of his undertaking; otherwise, no confidence could have been induced in her by his acts, and, of course, without such knowledge on her part, it could not be held that she relied upon the assumption that he had exercised reasonable care and skill in the performance of that work. No such proof is made. It is therefore the opinion of the court that the evidence in behalf of the plaintiff was not sufficient to entitle her to a verdict against the defendant Day, and that the non-suit was properly ordered.

We assume that the plaintiff does not now urge the other exceptions taken, as no argument in their support is presented in the brief of plaintiff's counsel.

But we find no reversible error in the rulings excepted to. The testimony excluded was clearly incompetent and immaterial. "Agency cannot be established against an alleged principal by showing the words and acts of the alleged agent." *Eaton v. Provident Association*, 89 Me. 58, 35 Atl. 1015.

The entry in this case must therefore be: **Exceptions overruled.**

PARNELL v. ATLANTIC COAST LINE RAILROAD CO.

[SUPREME COURT OF SOUTH CAROLINA, APRIL 8, 1912.]

— S. C. —, 74 S. E. 491.

1. Carriers—Terminal Line—Goods—Injury—Presumption

A terminal carrier who delivers to a consignee in a damaged condition, a piano which it received from a connecting carrier, is presumed to have received the same in good condition, and, therefore, has the burden of showing that it was damaged when received by it.

2. Carriers—Terminal Line—Injury to Goods—Presumption—Nonsuit.

In an action against a terminal carrier to recover damages for injuries to a piano, received in the course of shipment, the court should order a nonsuit, where the defendant produces clear and conclusive evidence to rebut the presumption that the injuries occurred after it had received the same from a connecting carrier.

3. Appeal—Weight of Evidence—For Jury.

The weight of evidence introduced in an action against a terminal carrier to recover damages for injury to a piano, to overcome a presumption that the piano was damaged after it was received from a connecting carrier, is for the jury, and their verdict will not be disturbed on appeal.

Appeal by defendant from a judgment of the Circuit Court of Common Pleas of Darlington County, rendered in favor of plaintiff, Mamie A. Parnell, in an action brought to recover for damage to a piano. Affirmed.

For appellant—W. F. Dargan.

For respondent—J. Monroe Spears, and Miller & Lawson.

WOODS, J. The plaintiff on December 27, 1908, delivered to the St. Louis & Iron Mountain Railroad Company at Collinston, La., a piano inclosed in a box, consigned to herself at Lamar, S. C. The piano was delivered by the Southern Railway, an intermediate carrier, to the defendant, the terminal carrier, at Sumter, S. C. On arrival at Lamar it was found to be considerably injured; and the plaintiff in this action recovered against the defendant a judgment for actual damages fixed by the jury at \$350.

NOTE.

On the subject of Presumption of Negligence, see notes in 5 Am. Neg. Rcp. 77; 8 Am. Neg. Rep. 298.
And on the subject of Negligence of

Two Carriers, see note in 8 Am. Neg. Rep. 164.

And on the subject of Liability of Connecting Carriers for Negligence, see note in 12 Am. Neg. Rep. 191.

The appeal depends on the defendant's position that the circuit judge should have granted a nonsuit or directed a verdict on the ground that its evidence was overwhelming and admitted of no other conclusion than that the piano had been damaged before it was received by it at Sumter. The plaintiff testified that the piano was in good condition, and properly packed in a new box when it was shipped; and the agent of the initial carrier testified that it was shipped by him from Collinston in good condition.

On the part of the defendant there was evidence from a number of railroad agents who handled the shipment that the box was old, too large for the piano, and that the packing was very badly done. This conflict of testimony made a distinct issue of fact which only the jury could decide as to the condition of the shipment when it was received by the initial carrier.

In a case like this, it is well-nigh impossible for the owner of property to ascertain on which of several connecting carriers property in transit was injured, and to meet this difficulty the courts have generally held that the burden is on the carrier which delivers the goods to the consignee to respond to any damage which occurs in transit unless it can affirmatively show that the goods were injured while in the hands of some other carrier. *Willette v. Southern Ry Co.*, 66 S. C. 477, 14 Am. Neg. Rep. 635, 45 S. E. 93. This presumption against the terminal carrier stands as evidence throughout the trial to be weighed by the jury alone with any rebutting evidence of the defendant tending to show that the damage was done while the goods were in the hands of another carrier.

Nevertheless, when the rebutting evidence is so clear and conclusive that no reasonable man could fail to come to the conclusion that the damage had not been done by the terminal carrier, then it would be the duty of the court to order a nonsuit or direct a verdict for the defendant (*Baker v. Western Union Tel. Co.*, 87 S. C. 174, 69 S. E. 151), and the defendant contends that the evidence offered to rebut the presumption of damage while the goods were in the hands of the terminal carrier was so conclusive as to come up to this standard. In weighing evidence to ascertain whether the terminal carrier has, beyond all doubt, overcome the presumption, it ought always to be borne in mind that the presumption is based on the fact that the shipper usually has no other protection, and no other means of meeting any testimony of the railroad agents as to the place where the damage occurred.

Assuming all the testimony of the railroad agents to be true, it falls short of conclusively showing that the damage was not done on the

terminal road. It is true that the agents testified, and the waybills indicate, that the box was in bad condition when it was delivered to the Southern Railway, the intermediate carrier, and by it to the defendant, the terminal carrier; but not one of the agents examined the piano itself or could testify as a fact known to him that the defect in the packing or the breaking of the box had resulted in injury to the piano before it reached the terminal carrier. It is true the evidence of the witnesses seemed to make it very probable that the damage was done before the piano was delivered to the defendant, but it was the province of the jury, and not of the judge, to weigh the probability against the presumption to the contrary, and there is no ground for this court to disturb the conclusion the jury reached.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur. FRASER, J., did not hear the case.

WILLIAMS v. NORVELL SHAPLEIGH HARDWARE CO.

[SUPREME COURT OF OKLAHOMA, JULY 11, 1911.]

— Okla. —, 116 Pac. 786.

1. Innkeepers—Liability—Goods of Commercial Travelers.

Where property is brought to a hotel for the purpose of sale or show, such as the goods of commercial travelers, the law does not hold an innkeeper to his strict liability, but only to the exercise of ordinary care and answerable for negligence.

2. Innkeepers—Negligence—Question for the Jury.

Where, from the facts shown by the evidence, reasonable men might draw different conclusions respecting the question of negligence, it must be submitted to the court or jury trying the cause.

[Headnotes by the Court.]

In error to the County Court of Carter County to review a judgment in favor of plaintiff rendered in an action by Frank Williams against the Norvell Shapleigh Hardware Company to recover damages for loss of merchandise stolen from a room in defendant's hotel. Affirmed.

CASE NOTE.**Liability of Innkeeper for Injury to,
or Loss of Goods of Traveling
Salesman.**

- I. IN GENERAL, 321-322.
- II. STATUTORY MODIFICATION OF LIABILITY, 323-324.
- III. NEGLIGENCE OF GUEST, 324-325.

I. In General.

It is well settled that an innkeeper is relieved of his strict common law liability for the loss of the baggage of a guest, and is held only to the exercise of ordinary care, where the guest has a special room in the hotel assigned to him for the purpose of exhibiting his goods for sale or inspection. *Myers v. Cottrill*, 5 Bissell (U. S.) 465, Fed. Cas. No. 9985 (1873); *WILLIAMS v. NORVELL SHAPLEIGH HARDWARE CO.* (Okla. 1911) 116 Pac. 786 (the case annotated).

In *Myers v. Cottrill*, *supra*, it was held that where a commercial traveler was assigned to a room in a hotel, to which valuable articles of merchandise, such as watches, chains and other articles of jewelry, were sent for the purpose of display and sale to the public, and a large part of which was sold by him, and thereafter, upon leaving the room without locking the door, and during his absence therefrom, a quantity of the merchandise was stolen, the innkeeper was not chargeable for the loss under the strict rule of the common law, in absence of proof of the innkeeper's negligence or that some special circumstance existed showing that he had assumed responsibility for the care of the goods. In speaking of the liability of the landlord under such circumstances the court said: "It is, we know, as a matter of experience, impracticable for the landlord to notice and vouch for every person who goes into the room. The guest permits them

For plaintiff in error—L. S. Dolman.

For defendant in error—Bledsoe & Little.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover damages for the loss of certain merchandise belonging to the plaintiff, which was stolen while in the sample room of the Whittington Hotel, at Ardmore, of which the defendant was proprietor.

The petition alleged, in substance, that on the 2d day of August, 1906, one George Vickers, a traveling salesman for the plaintiff, was a guest at said hotel, and had with him said merchandise as samples; that while said samples were in the said sample room of said hotel said merchandise was stolen by reason of the negligence of the defendant. On a trial to the court, there was judgment for the plaintiff, to reverse which this proceeding in error was commenced.

The principal ground for reversal, as we gather it from the brief of counsel for plaintiff in error, seems to be that the court below held the defendant to the common-law liability of an innkeeper, and

to stay as long as he pleases, and shows the goods and sells them to whomsoever he pleases. We must presume that it is not for that purpose that the innkeeper allows persons to come to his house and enter his rooms, and the fact that the vendor may sleep in the room I do not think changes the rule."

If a guest at an inn deposits his goods in a room which he uses as a warehouse, and of which he has the exclusive possession, the innkeeper is not liable for the loss of the goods, under the doctrine of the common law liability of innkeepers. But if the commercial traveler did not have exclusive control of the room, having delivered the key thereof to the wife of the innkeeper, and the innkeeper used the same for parcels, the latter may be held liable for the loss of the goods. *Farnworth v. Packwood*, 1 Starkie (Eng.) 198 (1816).

In *Scheffer v. Corson*, 5 S. D. 233 (1894), it appeared that a traveling salesman who was a guest at a hotel was, at his request, given an extra room

in the basement of the hotel in which to exhibit his samples, and while they were spread upon tables standing against the outside of the walls of the room they were injured by water and mud which came in from outside during a rain storm. The evidence tended to show that the storm which caused the damage came up between nine and ten o'clock in the evening and was of unusual violence. Upon the trial the court instructed the jury that, in respect to the goods in question, the defendants did not assume the full and ordinary liability of innkeepers, as established by the common law and declared by statute, but that if they were liable at all, their liability must result from the absence of ordinary care; and if the defendants have been guilty of any act or want of ordinary care—in other words any want of negligence—which resulted in damage to the goods, then the defendants are liable. No exceptions were taken to the charge of the court, and under the established law of appellate practice a verdict in favor of the plaintiff was sustained.

that, if the proper rule as to liability was observed, to wit, that of a bailee, there would not be sufficient evidence to establish want of ordinary care on the part of the defendant. There is nothing in the record to indicate what the views of the court below were on the question of liability, but we are satisfied that there was ample evidence adduced at the trial to sustain the judgment of the court on either theory. We think counsel is correct in his contention that under the circumstances the defendant was only liable as a bailee for want of ordinary care.

The rule seems to be quite well settled that, where property is brought to a hotel for the purpose of sale or show, such as the goods of commercial travelers, the law does not hold an innkeeper to his strict liability, but only to the exercise of ordinary care and answerable for negligence. *Neal v. Wilcox*, 49 N. C. 146, 67 Am. Dec. 266; *Scheffer v. Corson*, 5 S. D. 233, 58 N. W. 555; *Jalie v. Cardinal*, 35 Wis. 118; *Myers v. Cottrill*, 5 Biss. 465, Fed. Cas. No. 9985; *Farnsworth v. Packwood*, 1 Stark. 249; *Fisher et al v. Kelsey, et al*, 121 U. S. 383, 7 Sup. Ct. 929, 30 L. Ed. 930. It is admitted by counsel that

II. Statutory Modification of Liability.

In some jurisdictions statutes have been passed modifying the common law liability of an innkeeper for injury to or loss of the baggage of a guest. Thus, under a Missouri statute which provides that no innkeeper "shall be liable * * * for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall have given written notice of having such merchandise for sale and sample in his possession after entering the inn, nor shall the innkeeper be compelled to receive such guests with merchandise for sale or sample." It was held that an innkeeper was not liable, in absence of proof of negligence, for the loss of merchandise consisting mainly of gold chains, chain trimmings and necklaces, which were brought into the inn and placed in a room assigned to the plaintiff at his request for the purpose of exhibition to customers, where the salesman failed to give the statutory

notice, although the innkeeper had actual knowledge that his guest was in possession of merchandise for sale. "If as to such merchandise," said the court, "it is intended to hold the innkeeper to the strict liability imposed, at the common law, in respect to the baggage or other than personal property of a guest, the statute indicates the mode in which that intention must be manifested. The guest may give notice of such intention. And as the notice is expressly required in writing, no other form of notice can be deemed a compliance with the statute." *Fisher v. Kelsey*, 121 U. S. 383, 30 L. Ed. 930 (1887).

And under a Massachusetts statute which exempts innkeepers from liability for the loss of goods which are not personal baggage and effects, unless such goods shall be delivered by the commercial traveler to the innkeeper for safe keeping, it was held in *Becker v. Haynes*, 29 Fed. 441 (1887), that an innkeeper is not liable for the loss of a trunk of a commercial

this loss occurred in Indian Territory, prior to statehood, and that the common law as to innkeepers was in force therein.

Discussing the rule at common law, in *Fisher et al v. Kelsey et al*, *supra*, Mr. Justice Harlan says: "Although Fisher was received by the defendants into their hotel, as a guest, with knowledge that his trunks contained articles having no connection with his comfort or convenience as a mere traveler or wayfarer, but which, at his request, were to be placed on exhibition or for sale in a room assigned to him for that purpose, they would not, under the doctrines of the common law, be held to the same degree of care and responsibility, in respect to the safety of such articles, as is required in reference to baggage or other personal property carried by travelers. He was entitled, as a traveler, to a room for lodging; but he could not, of right, demand to be supplied with apartments in which to conduct his business as a salesman or merchant. The defendants, being the owners or managers of the hotel, were at liberty to permit the use by Fisher of one of their rooms for such business purposes; but would not, for that reason and without other circumstances, be held to have had his goods in their custody, or to have undertaken to well and

traveler containing valuable samples which was not deposited with him for safe keeping, in the absence of proof showing willful fault or neglect on the part of the innkeeper. In this case it appeared that the trunk in question had been delivered to the agent of an express company to be transported to the defendant's inn, and a check or receipt given therefor; upon reaching his destination, the agent of the plaintiff proceeded to the inn, registered his name and was assigned to a room, after delivering the check or receipt to the clerk of the inn with the statement that it was for a trunk; the agent of the express company shortly thereafter brought the trunk to the inn and deposited it, with others, on the sidewalk in front of the inn; it was, however, never brought into the inn, but was stolen from the sidewalk.

III. Negligence of Guest.

In an English case it was held that an innkeeper is not liable for the goods of a guest which were lost

through the negligence of the guest, from a private room in the inn chosen by the guest for the purpose of exhibiting the goods for sale to customers, where the innkeeper, at the time of assigning the room to him, told him that there was a key to the door and that he might lock the door, but which he neglected to do. The court said: "Now the law obliges an innkeeper to keep the goods of persons coming to his inn, *causa hospitandi*, safely, so that in the language of the writ *pro defectu hospitatoris hospitibus damnum non eveniat ullo modo*. And I do not say that if the goods be stolen from the inn, it is not *prima facie* to be taken as happening through the fault of the innkeeper. But there can be no doubt also that there may be circumstances, as if the guest by his own negligence induces the loss, or introduces himself the person who purloins the goods, which form an exception to the general liability, not coming within the words *pro defectu hospitatoris*, and under such circumstances the plaintiff shall

safely keep them as constituting part of the property which he had with him in his capacity as guest. Kent says that, 'If a guest applies for a room in an inn, for a purpose of business distinct from his accommodation as a guest, the particular responsibility does not extend to goods lost or stolen from that room.' 2 Kent, 596. See, also, *Myers v. Cottrill*, 5 Biss. 465, 470 (Fed. Cas. No. 9985), *Drumond, J.*; *Story, Bailm. par. 476*; *Burgess v. Clements*, 4 Maule & S. 306; *Redfield, Carriers & Bailees*, 443; *Addison, Law Cont. (6th Ed.) 360.*"

The foregoing authorities, we think, clearly establish the liability of the defendant to be that of a bailee. But treating him as such, there is still evidence reasonably tending to show want of ordinary care on his part. The rule is: Where, from the facts shown by the evidence, reasonable men might draw different conclusions respecting the question of negligence, it must be submitted to the court or jury trying the cause. *San Bois Coal Co. v. Janeway*, 22 Okl. 425, 99 Pac. 153.

The judgment of the court below is affirmed. All the Justices concur, except DUNN and HAYES, JJ., absent, and not participating.

not complain of the loss." *Burgess v. Clements*, 4 Maule & S. 306 (1815).

In *Richmond v. Smith*, 8 Barn. & Cress. 9 (1828), which was an action brought by a commercial traveler against an innkeeper for the loss of certain goods, it was contended by the defendant that the plaintiff, in ordering the goods in question to be taken into the commercial room, took them under his own protection and therefore could not hold the innkeeper liable for their loss by theft. In holding the defendant liable, the court said: "It is clear that at common law when a traveler brings goods to an inn the landlord is responsible for them. And if it had been intended by the defendant not to be responsible unless his guests chose to have their goods placed in their bedrooms, or some other place

selected by him, he should have said so. In this respect I think that the situation of the landlord was precisely analogous to that of a carrier, and that the direction given to the jury was right." The court distinguished the case of *Burgess v. Clements*, *supra*, on the ground that, in that case, the plaintiff asked to have a room assigned to him which was used for the purpose of trade and not merely as a guest in the inn.

And in *Eden v. Drey*, 75 Ill. App. 102 (1897), the court held that an innkeeper was liable for the loss of merchandise carried by a guest for the purpose of trade, unless it can be shown that the loss occurred without any fault on his part, or that it was occasioned by the fault of the guest.

SPIZALE v. LOUISIANA RAILWAY & NAVIGATION CO.

[SUPREME COURT OF LOUISIANA, FEBRUARY 13, 1911.]

128 La. 187.

1. Railroads—Operation in Yards—Signals—Negligence.

Where it was not customary for a railroad company to ring the bell or sound the whistle while switching cars in its yard, except when passing street crossings, it was not actionable negligence for failure to do so on a particular occasion toward one who was familiar with the movements of trains in the yard.

2. Railroads—Drainage Ditch—Duty to Trespasser.

A railroad company owes no legal duty to a trespasser to cover a small drainage ditch running across its track in its yard.

3. Railroads—Yards—Duty to Trespasser.

The only duties which a railroad company owes to a boy trespassing upon the tracks in its yards, where cars are being switched, is to keep a reasonable lookout in moving its locomotive and not to run upon him after having seen him.

Appeal by defendant from a judgment of the Civil District Court, Parish of Orleans, rendered in favor of plaintiff in an action brought by Mary B. Spizale, in her own behalf, and in behalf of her infant son, to recover damages for personal injuries to the latter caused by being run over by a switch engine operated by defendant, The Louisiana Railway & Navigation Company. **Reversed.**

For appellant—Foster, Milling, Brian & Saal,

For appellee—E. S. Whittaker.

PROVOSTY, J. The plaintiff's little son, 11 years old, was run over by a switch engine of the defendant company, and both his legs cut off; and the plaintiff, in her child's behalf and also in her own, sues in damages.

After the defendant's road, on its way into the city and toward the river, has crossed Napoleon avenue, it enters upon a strip of ground belonging to the city, but of which, by grant from the city, the defendant company has the perpetual use for its tracks and terminals.

NOTE.

On the subject of Children Trespassing on Railroad Track, see note in 3 Am. Neg. Rep. 317.

And on the subject of Children Injured at Railroad Crossing and on Track, see note in 10 Am. Neg. Rep. 425.

This strip of ground is along the downtown embankment of the New Basin Canal. Along the base of the embankment there used to be a wide drainage canal. The defendant company has filled in this old canal for a considerable distance, beginning, we may say, at Carrollton avenue and going towards the river, and built a long narrow warehouse upon the site. Beyond this warehouse, in the direction of the river, the old canal still exists and is usually full of water. The tracks are alongside of this warehouse and old canal. There are three of them—one main track and two side tracks. They are 13 feet apart from center to center. On the other side of them, 12 feet from them, is the fence of the White City amusement park and baseball grounds and a continuation of this fence. From Carrollton avenue to Hagan avenue, a distance of 2,711 feet, no street crosses this strip of ground, and only one street opens upon it and only on one side. The tracks are constructed as in the open country; that is to say, the earth is raised to the top of the cross-ties along the center of the track between the rails, and sloped towards the sides, so that the ends of the cross-ties are not filled between. As an effect of this construction, there is a depression between the tracks, and drains have had to be provided across the tracks for letting out the drainage water.

A freight train of 20 cars and a locomotive came across Carrollton avenue going towards the river, on the main track; the locomotive pushing the cars with its head end towards them. When the forward end of the train reached the first switch, which is about 1,500 feet from Carrollton avenue, six of the cars were kicked down the main track. The train then stopped and remained stationary about one minute. The forward end, from which the six cars had been detached, had gone one car length beyond the switch. As the next two end cars had to be switched to the side track, the train backed far enough to clear the point of the switch, or about two car lengths, and then moved forward again far enough to put the two cars upon the side track, and again stopped.

At the time that the train began to move forward this last time to put the two cars upon the side track, the fireman who was sweeping the coal dust on the floor of the engine, heard a noise, which he calls a scream, but which on cross-examination, he described as follows:

“Q. Was it a noise like a calf or a pig? A. It was a noise like—(witness grunts) I can't tell you exactly. Q. Was it loud or soft? A. It was not very loud. Q. Could a little boy have made a noise like that while you were backing a few minutes before, and you not hear it on account of the noise of the engine? A. He might have made the noise and I didn't hear him.”

The fireman got off the engine and looked for the source of the noise, and saw the little boy under the locomotive. There was a small drainage ditch there across the track, and he was lying in it with both legs across the rail.

His story is that, on his way back from carrying a message for his mother to his brother, who was working in the White City amusement park, he had passed through a hole under the fence of the White City and had walked alongside of the track a distance of about 60 feet towards the locomotive; and that, when about 35 or 40 feet of it, seeing that it remained stationary, he had decided to cross the track; and that just as he stepped upon the track the locomotive started off and jerked the cars; and that the noise made thereby scared him, and, being afraid to run across the track, he went to turn around, and, as he did so, he stepped into the ditch which was behind him and fell.

The negligence charged against the defendant company is that the bell was not rung before the locomotive moved, nor the whistle sounded; that a proper lookout was not kept, and that this little ditch, or drain, was left uncovered.

The evidence shows that it was not customary to ring the bell or sound the whistle upon this yard while switching, except in passing the street crossings; the not doing so on this particular occasion was therefore not negligence. Moreover, the evidence shows further that the boy lived about a block from this yard, and was familiar with the movements of the trains upon it, and that he knew that this very train was engaged in doing switching work and constantly moving back and forth, and that it was therefore liable to move at any moment, and make the very noise which it made.

The engineer testifies that he was keeping a proper lookout; and he is not contradicted, except that it is shown that, while the train was stationary, he was so absorbed in conversation with the track foreman, who, in violation of the rules of the company, was riding upon the engine, that the signal for backing had to be given him twice. That circumstance, by the way, accounts for the train having remained stationary on that occasion longer than was usual or necessary. The engineer was not alone in failing to see the boy while the latter was, as he says, walking alongside of the track, or standing upon it; the fireman, the yardmaster, and the brakeman also did not see him. The yardmaster and the brakeman, it may be well to mention, were on the uptown or New Basin side of the track, and therefore on the side opposite to that from which the boy approached the track. The train was therefore between them, which may account for their not seeing him.

A track foreman who, with 15 other colored men, was repairing the track between Carrollton avenue and the place where the engine was stopped, and who had had to interrupt his work and remove his tools from the track in order to let the train pass, and who, after the train had passed, stood upon the track looking at the engine, about a hundred or more feet from it, to see whether it was coming back, in order that, in case it was not, he might resume his work, says that, after he had given his men the order to get the tools out of the way to let the train pass, he walked ahead to remove his "stop board" from the track, and at that moment saw the boy on the top of the White City fence, and did not at any time see him on the track.

Conceding, however, for the argument, that this small drain in its uncovered state was so evidently a source of danger that the leaving of it in that condition amounted to negligence on the part of the defendant company, and conceding further that the statement of the boy as to the manner in which he fell into this drain is true, the defendant company owed him nothing, since it owed him no legal duty with reference to the drains upon its yard; and since, he being a trespasser upon its yard, it owed him no other duty than the general duty to keep a reasonable lookout in moving its locomotive, and not to run upon him after having seen him. Elliott on Railroads (2d Ed.) § 1258, vol. 3, page 612.

From the evidence as a whole we are inclined to believe that the boy fell into the ditch, not in the way he says, but while trying to steal a ride upon the footboard of the engine. This would account fully for his position, with both legs upon the track and unable to get out in time not to be run over. Whereas, his being frightened by a noise which he was hearing every day, since he lived within half a block from this yard and had but just heard, with which he was perfectly familiar; his trying to turn back, instead of going ahead and crossing the track; his inability to get out of the ditch or gutter in time to avoid a slow coming engine 35 to 40 feet away; and his not screaming so as to be heard by so many persons near by—all seem improbable. And, finally, if the witnesses are not mistaken in their estimate of how far the forward end of the train went beyond the switch, the train was not far enough in the direction of the river for the engine to have been clear of this drain, but the engine was over this drain while the train was stationary, and not 35 or 40 feet from it, as the boy says.

Judgment set aside, and suit dismissed, at plaintiff's cost.

COBERTH v. GREAT ATLANTIC & PACIFIC TEA CO.

[COURT OF APPEALS, DISTRICT OF COLUMBIA, MARCH 6, 1911.]

36 App. D. C. 569.

1. Negligence—Storekeeper—Invitation—Customer—Trapdoor—Injury.

A proprietor of a store who by notice, expressly withdraws, for a certain day each week, his implied invitation to customers to visit a part of the building where prizes are kept and exchanged for tickets is not liable, although he assigns no definite reason for his action, to one who disregards such notice and is injured by falling through an open trapdoor located in that part of the store.

2. Negligence—Safe Place—Invitation.

The liability of an owner for the condition of his premises, to one there by his invitation, extends no further than the invitation.

3. Negligence—Invitation—Withdrawal.

A request by a clerk in a store, that a customer refrain from going into a certain part of the store where premiums are displayed, is as effective as a command, to withdraw an implied invitation theretofore existing to visit such part, and, therefore, a customer cannot recover damages for injuries sustained by falling through a trapdoor left open in that part of the store.

4. Trial—Instruction—Opinion.

A statement by the trial judge in his charge, that he recalls no evidence as to a certain fact, although not commendable, is not prejudicial where he told the jury that they were free to consider the evidence for themselves.

Appeal by plaintiff from a judgment of the Supreme Court of the District of Columbia, rendered in favor of defendant in an action brought to recover damages for personal injuries sustained by falling through an open trapdoor in defendant's store. Affirmed.

For appellant—W. Gwynn Gardiner.

For appellee—Charles A. Douglas, Gibbs L. Baker, H. H. Obear, and C. Colden Miller.

DECLARATION.

The plaintiff, Annie A. Coberth, sues the defendant, The Great At-

NOTE.

On the subject of Liability of Storekeeper for Personal Injuries Sustained in Stores, see note in 8 Am. Neg. Rep. 266.

And on the subject of Duty of Storekeeper to Warn Customers, see note in 16 Am. Neg. Rep. 101.

lantic & Pacific Tea Company, a corporation, for that, to wit, at the time of the commission of the grievance hereinafter described. and for a long time prior thereto, the defendant was, and still is, engaged in the mercantile and merchandise business, more particularly engaged in the business of buying and selling teas, coffees, sugar, spices, groceries, and many other various kinds of merchandise, and in the furtherance of said business, the defendant was, and is, operating a chain or number of stores in many cities and towns of the United States of America, and that among these said stores as aforesaid were several owned, conducted and managed by said defendant in the City of Washington, District of Columbia, one of which being located at or about number 3007 M Street, Northwest, in the City and District aforesaid; that this said store of defendant situated and located as aforesaid, was, at the time of the commission of the grievances hereinafter mentioned, for a long time prior thereto, and still is, open to the general public for the purpose of carrying on the business aforesaid, and during the regular business hours of said defendant, the doors of said store were open with the invitation of the public and its customers to enter, inspect its wares, and to deal with said defendant, and it then and there became and was the duty of said defendant, its employees and servants, to have and keep said stores in a reasonably safe and proper condition so that any person or persons entering said store while open for the conduct of its said business, would be protected from injury to life or limb while therein, but notwithstanding this duty imposed upon said defendant, said plaintiff, on or about, to wit, February 6th, 1909, while in defendant's said store at said number as aforesaid, not knowing of the unsafe and dangerous condition of said store, which unsafe and dangerous condition, defendant well knew or should have known, and without any carelessness or negligence on plaintiff's part, while said plaintiff was walking about the said store of defendant inspecting and examining the goods offered for display on the shelves of defendant's store, was suddenly and without notice to her from the defendant or anyone else, precipitated, through an open hole in the floor where there was an open trapdoor, absolutely unguarded, to the floor of the cellar a considerable distance below; that by reason of the carelessness and negligence of said defendant, its employees and servants in failing to guard or protect said opening, or to keep said trapdoor closed, or to warn plaintiff of the said danger which was its or their duty so to do, plaintiff has received and sustained many severe, dangerous, and permanent injuries, all being the direct and proximate result of defendant's negligence in the premises, to wit, a fracture of the radius of

the arm at its lower extremity which fracture involves the wrist joint and results in a permanent impairment of the movement of the wrist joint; a fracture of the styloid process of the ulna; a fracture of several ribs on the left side injuring the lung; contusions of both knees and ten of synovitis in both knees; dislocation of the patella of right knee; deep stellate, lacerated, and contused wound in centre of forehead, resulting in a permanent and ugly scar; severe contusions about the body and limbs, and severe sprains of muscles of back and neck resulting in great pain and total disability; that as a result of said injuries plaintiff is and will be permanently in the future and as long as she may live a physical and mental wreck; that she has suffered as a result of said injuries intense pain and anguish, and suffers both physical and mental, and will so continue to suffer in the future; that as a result of said injuries her nervous system has sustained such a severe shock that she has been and will continue to be a nervous wreck; and that as a further result of said injuries plaintiff has been and will be for the future utterly incapacitated for work of any kind, physical or mental, and has also incurred and will incur in the future large expenses for medicine, nursing and physicians in and about her endeavor to be cured of said injuries and relieved of her suffering, and by reason of all the premises aforesaid she has been injured and damaged in the sum of \$25,000.

Wherefore, plaintiff claims from the defendant as damages the sum of \$25,000, besides costs of suit.

STATEMENT OF FACTS: This is an appeal from a judgment upon the verdict of a jury for the defendant, the Great Atlantic & Pacific Tea Company, a corporation, in an action for personal injuries alleged to have been sustained by the plaintiff, Annie A. Coberth, by reason of the negligence of the defendant in leaving open and unguarded a trapdoor in the back of its store, through which the plaintiff fell.

The defendant corporation, on February 6th, 1909, was operating a retail store at Thirty-first and M Streets, N. W., in this city. It appears that the company gave its customers, with their purchases, tickets which the company subsequently received in exchange for china and crockery ware, a sort of premium arrangement. These premiums were kept in the back of the store, and customers were permitted to inspect them upon all days when the store was open, except Saturdays, when, owing to the increased trade and the congested condition resulting therefrom in that part of the store where the premiums were displayed tickets were not exchanged. A notice to

that effect was posted in the store. The back part of the store was separated from the main part by a flour counter, with a 3-foot opening therein. There was evidence that upon the occasion in question there were barrels about this opening, so that a space remained something less than 1 foot wide, through which ingress to the back of the store could be made. Near the stand where these premiums were kept was a trapdoor large enough to admit a sugar barrel, and which was left open on the day of the accident.

The evidence on behalf of the plaintiff was to the effect that she went to the store on the evening of said day, made some purchases, received some tickets therewith, and then informed the clerk that she would like to exchange tickets that she had brought with her for dishes; that the clerk assented; that they went back to where the premiums were displayed; that she did not like the cup which the clerk showed her, and that, in attempting to reach for another, she fell through the trapdoor, which, of course, she had not seen; that she did not know that tickets were not redeemed on Saturdays, nor was she so informed. One witness testified in corroboration of plaintiff.

The evidence on behalf of the defendant tended to show that the plaintiff was informed that tickets were not redeemed on Saturdays, and that, upon her insistence that she needed cups for Sunday, the clerk who waited upon her told her to stay where she was (in the main part of the store), and he would bring her what she wanted; that thereupon he brought out some cups and saucers, which did not suit her; that the clerk started to get more, and that, when plaintiff started to follow, he told her to stay where she was and he would bring them to her; "that he went on back, and that she followed him back; that he did not see her; that he went behind the crockery stand to get some cups, and that is the last he knew of it until he found her down in the cellar." The manager of the store testified that he also said to plaintiff: "Do not go back; he will bring them to you." Two other witnesses, one not connected with the defendant in any way, testified to the same effect.

Counsel for the plaintiff prayed the court to instruct the jury in substance that the plaintiff was justified in going into the back part of the store, unless the jury should find "from all the evidence in the case that she was instructed not to go back where the trapdoor was located. Then, in that event, it would be a question you would have to determine as a matter of fact whether the plaintiff used that degree of care and caution under all the circumstances of the case that a person of ordinary prudence and caution would have used under all

the circumstances in the case." This request the court refused, and exception was noted. The court charged the jury, as requested by the defendant, that if they believed "from the evidence that any of the agents or employees of the defendant warned or requested the plaintiff not to come upon that portion of the premises where the trap door in question was located, but that the plaintiff disregarded this warning or request, and of her own accord and without the knowledge of the defendant company or its agent, entered upon that portion of the premises where said trapdoor was located, and became injured in consequence by falling through said trapdoor, their verdict must be for the defendant." The plaintiff noted an exception to this portion of the court's charge.

In the course of its general charge, the court told the jury that the duty of the defendant to provide the plaintiff a reasonably safe place in which to transact her business did not extend to that part of the store into which she was warned or requested not to go. The court continued: "Of course, if she went there and the defendant saw her there, then there would be a duty arising which would be the reasonable exercise of caution on the part of the defendant to prevent the accident; but I ought to say, so far as my own view of the testimony is concerned, that I know of no evidence in this case which shows that the defendant company knew that she was there, so far as that phase of the case is concerned, unless you take the view of the plaintiff in this case that she was never prevented from going there. You are entitled to pass upon the evidence yourselves. The court may give you its views of the evidence; but it is not binding on you. You are entitled to believe or disbelieve any part of the evidence that you find in the case." To this part of the charge the plaintiff also excepted.

ROBB, J. (after stating the foregoing facts). Plaintiff's right of action necessarily grows out of the implied invitation of the defendant to her to enter and to walk about its store, and the corresponding duty which devolved upon the defendant to see that its store was a reasonably safe place. It follows, therefore, that the real question in this case is whether what was said to the plaintiff upon the occasion in question amounted to a withdrawal of the invitation to enter that part of the store where the prizes were kept. Under the evidence it is apparent that customers, on every day the store was open except Saturday, had the right to expect that both the main and back part of the store would be kept in a reasonably safe condition; but if the defendant expressly withdrew its implied invitation to the

plaintiff to visit that part of the store where prizes were kept, the plaintiff, to the extent of her disregard of such notice, became a mere licensee, and unless the defendant was guilty of active or willful negligence, which in view of the finding of the jury cannot be here asserted, it is not responsible for the ensuing injury.

The plaintiff insists that the jury should have been permitted to find not only whether she was notified not to go back where the trap-door was located, but also whether the plaintiff, in view of the nature or character of such notice exercised that degree of care and caution demanded of her; in other words, that, notwithstanding the jury should find that the defendant expressly withdrew its implied invitation to the plaintiff to enter the rear of its store, where this danger existed, and notwithstanding that she, without the knowledge of the defendant, disregarded such express notice of withdrawal, and placed herself in a position of peril, the jury should be permitted to speculate whether the defendant ought not to have gone further and assigned a definite reason for its action. We are unable to assent to this doctrine.

In *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120, the parties were farmers. Plaintiff went to the defendant's place late in the evening to buy a few bushels of oats. While the defendant had no oats to sell, he finally consented to accommodate the plaintiff. Thereupon the parties repaired to the defendant's granary, which was always kept locked, and went to the upper floor, where the oats were. While the defendant stepped back to get a measure, plaintiff walked about the floor in the dark, fell through a hole therein, and was injured. It was held that the defendant was not liable for the injury, the court saying: "The plaintiff was permitted there (in the granary) for one simple, specific matter of business—to take six bushels of oats; the oats were shown him; to facilitate the delivery, the defendant went for his measure; he left the plaintiff at the oats, where he should be in the dark, but in a safe place. The oats could be delivered at no other place, and no other matter of business was permitted to him there. If, for curiosity, or other motive, he chose to occupy that moment in the darkness in wandering about the granary, * * * he was doing what he was not invited or permitted to do, and what was no part of the business in hand; and we think this departure was of his motion and at his risk."

In *Ferguson & P. Co. v. Ferguson*, (Ky.), 114 S. W. 297, it was held that a sawmill company operating a wood conveyor from its mill to the wood yard is not liable to a purchaser of wood for injuries received by the fall of a stick of wood from the conveyor while such

purchaser was loading his wagon at a place and in a manner not intended for such loading. The court said: "When the defendant invited the plaintiff to haul its wood, it only invited him to use that part of its yard that was provided for that purpose; and if he did not use the premises intended for his use, and put himself in a dangerous position, standing where he was not intended to stand, he took the risk, and cannot recover."

In *Ryerson v. Bathgate*, 67 N. J. L. 337, 11 Am. Neg. Rep. 300, 51 Atl. 708, 57 L. R. A. 307, plaintiff was the possessor of a cat of which she desired to be rid. Thereupon, the plaintiff arranged to give the cat to the defendants, who ran a meat shop. Plaintiff's first attempt to deliver the cat was unsuccessful, owing to its escape upon plaintiff's arrival at defendant's shop. Plaintiff made another attempt, and upon arriving at defendant's shop told them to put the cat in a closet, or it would run away. Thereupon, she was told "put her in there." Plaintiff supposed "in there" to be a closet, stepped inside without looking, and fell downstairs. The court held that it was incumbent upon the plaintiff not only to show "that her entry upon the premises was by invitation of the owner, but also that at the time the injury was received, she was in that part of the premises into which she was invited to enter, and was using them in the manner authorized by the invitation, whether express or implied. Her right of recovery was denied. See, also, *Glaser v. Rothschild*, (1909) 221 Mo. 180, 120 S. W. 1, 22 L. R. A. (N. S.) 1045, 17 A. & E. Ann. Cas. 576.

The general rule to be deduced from these and other cases is that responsibility in a given case extends no further than the invitation; in other words, that the owner's liability for the condition of his premises is coextensive with his invitation. The court in effect so charged the jury in the present case, and whether the language employed by the defendant's servants amounted to no more than a request that the plaintiff refrain from entering a well defined part of the store is immaterial. Such a request, if clearly expressed, was quite as effective as a command to withdraw the implied invitation theretofore existing.

While there was evidence from which the jury could have found knowledge on the part of the defendant of the plaintiff's presence in the place of danger prior to the accident, the court's charge did not take that question from the jury. The learned trial justice merely said to the jury that he recalled no evidence to that effect. He expressly told them that they were entitled to pass upon the evidence themselves. Owing to the weight given by the jury to any expres-

sion of opinion by the trial judge, the interests of justice require that he should "be careful to avoid any remarks which might tend to convey the impression to the jury that he has an opinion with respect to the proof of any disputed fact that has been submitted to them for decision." *Washington Gaslight Co. v. Poore*, 3 App. D. C. 139.

The court in the present case correctly laid down the law, and told the jury that they were free to consider the evidence for themselves. In the Federal courts this is sufficient. "Argumentative matter . . . should not be thrown into the scales by the judicial officer who holds them," and "as the jurors are triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments." *Star v. United States*, 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 841. It is clear that the trial court in the present case did no more than give expression to his recollection of the testimony concerning one phase of the case, leaving the ultimate decision of the question of fact where it belonged.

Judgment affirmed, with costs.

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THE TORONTO RAILWAY CO. v. TOMS.

[SUPREME COURT OF CANADA, APRIL 3, 1911.]

44 Can. Sup. Ct. Rep. 268.

Damages—Mental Shock—Injury—Street Car—Collision.

A passenger upon a street car who was injured by being violently thrown forward on the back of the seat in front of him when the car in which he was riding collided with a train, but who was able to leave the car and walk a short distance to his place of business where he collapsed, is entitled to recover damages for injuries to his nervous system, since such injuries were as much the direct result of the negligence of the street car company as those to his physical system, and in any case, it is impossible for a jury to sever the damages.

Appeal by defendant from a decision of the Court of Appeal for Ontario (22 Ont. L. Rep. 204), upholding a verdict rendered by a jury on the trial of an action brought by William Toms to recover damages for injuries sustained by him when a street car in which he was riding collided with a train. Appeal dismissed.

Solicitors for appellants—McCarthy, Osler, Hoskin & Harcourt.

Solicitors for respondent—Masten, Starr, Spence & Cameron.

THE CHIEF JUSTICE. This case is distinguishable from *Victorian Railways Com'rs v. Coultas*, 13 App. Cas. 222, 57 L. J. P. C. 69, 11 Am. Neg. Rep. 255, [1887-8]. In that case the condition from which the complainant was suffering was due to fright alone. Here there was impact resulting in some physical injury, however slight, to the respondent. The question at issue between the parties at the trial, as I understand it, was whether the jury should be directed to apportion the compensation allowed so as to distinguish between that which was attributable to injuries resulting from nervous shock and that properly attributable to physical contact. I would have thought it too clear for argument that where a person suffers physical injury, however slight, damages might also be claimed for the

NOTE.

On the subject of Damages Recoverable for Fright or Mental Suffering, see notes in 1 Am. Neg. Rep. 128; 5 Am. Neg. Rep. 15; 7 Am. Neg. Rep. 362.

On the Right to Recover Damages for Mental Shock due to Negligence, Unaccompanied by Physical Injury, see note in 11 Am. Neg. Rep. 250.

fright occasioned thereby. It would appear somewhat difficult to distinguish between the injury caused to the human frame by the impact and that resulting to the nervous system in consequence of the shock, the shock and the physical injury being both the result of the same accident. The nature of the mysterious relation which exists between the nervous system and the passive tissues of the human body has been the subject of much learned speculation, but I am not aware that the extent to which the one acts and reacts upon the other has yet been definitely ascertained. Those who are interested will find a learned discussion of the whole subject by Paul Bert in his book where he discusses the role played in the human system by what he calls "la grande sensitive." I do not think that many of the jurors who usually try damage cases have had their attention directed to this abstract subject which, as Bert says, has baffled the scientists for ages. For my part it is difficult to understand how a person should not be allowed to recover for an injury to the nervous system resulting from fright which frequently alone produces physical injuries of the most serious character. But we are not concerned with that question now. Here the fact of physical injury is established beyond all doubt, and, that fact once admitted, I cannot find the line of demarcation between the damages resulting to the human being by reason of the fracture of a limb or the rupture of an artery and that which may flow from the disturbance of the nervous system caused by the same accident. The latter may well be the result of a derangement of the relation existing between the bones, the sinews, the arteries and the nerves. In any event the resultant effect is the same. The victim is incapacitated and in consequence suffers damages, whether the incapacity results from the physical injury alone or the physical injury with the nervous shock superadded.

I will dismiss with costs.

DAVIES, J. After hearing counsel for the appellant we did not deem it necessary to call upon respondent's counsel to sustain the judgment appealed from.

The respondent sued the railway company for damages arising out of injuries he claimed to have been caused to him while being carried as a passenger on one of their street cars which, through the negligence of their servants, came into collision with a railway train.

The shock of the collision threw the respondent, as he stated in his evidence, from where he was sitting "right over to the back of the next seat," which would be the seat facing him.

No physical result of the collision upon the respondent was noticed

by him until he had left the scene of the accident and was proceeding towards his employer's office. He then, however, "suddenly collapsed," was conveyed to his home in a cab and for many weeks was unable to resume with any continuity his usual employment.

There were some slight apparent bruises on respondent's body, but none apparently serious.

The opinion of Dr. McPhedran, who was called on respondent's behalf, reached from listening to the evidence and accepting the history of the case as given to him by the respondent, was "that the physical shock that he suffered excited the condition that he was suffering from," that he did not think he was suffering "purely from a mental effect created on his mind," but thought "the physical effect was the exciting cause," and he described the respondent's condition as traumatic neurasthenia.

Some medical evidence was given by the defendants which did not agree with that of Dr. McPhedran and the trial judge was requested when leaving the case to the jury, to ask them to separate the plaintiff's injuries "as between the physical injuries and the nervous ones."

The learned Chief Justice who tried the case, in my opinion very properly refused to impose upon the jury what under the evidence was an almost, if not altogether, impossible task. He said:

"I was requested to put a question to you to separate the injuries as between the physical and the nervous injury. I declined to do that for one reason—a very sufficient one—amongst others that that question of physical injury is one of very doubtful meaning. There was not any great physical injury in the sense that there were any bones broken, or any great bruising or abrasion of the surface; but there may be a physical injury of a serious nature which is not indicated by any external mark. So, therefore, I leave the whole question to you to say what damages he ought to recover for the injury, if you think he has sustained any."

An attempt to divide the damages in the manner suggested would, it seems to me, have involved the merest speculation.

The demand at the trial to have the damages so assessed and divided was pressed at the trial and afterwards in the Court of Appeal and in this court on the assumed application to this case of the principle supposed to have been determined by the Judicial Committee of the Privy Council in the case of *Victorian Railways Com'rs v. Coultas*, 13 App. Cas. 222, 57 L. J. P. C. 69, 11 Am. Neg. Rep. 255 [1887-8]. The headnote of the case as reported seems correctly to state what was really decided:

"Damages in a case of negligent collision must be the natural and reasonable result of the defendant's act; damages for a nervous shock or mental injury caused by fright at an impending collision are too remote."

In delivering the judgment, their Lordships say:

"Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims."

The rule laid down by their Lordships as to the proper measure of damages to be allowed has not been called in question so far as I have seen, but the legal proposition stated that damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances as their Lordships were considering be considered a consequence which in the ordinary course of things would flow from the negligence of the gate-keeper, complained of in that case, has been the subject of much comment and adverse criticism alike in subsequent judicial decisions of the English and Irish courts, as also of those of Australia and of many text writers of recognized authority.

In the case of *Dulieu v. White & Sons*, 2 K. B. 669, 70 L. J. K. B. Div. 837, 11 Am. Neg. Rep. 257 (1901), at page 676 of 2 K. B., [page 260 of 11 Am. Neg. Rep.] Mr. Justice Kennedy thus refers to this decision of the Privy Council: "In that case the principal circumstances were that the appellants' gate-keeper negligently invited the male plaintiff and his wife, who were driving in a buggy, to enter the gate at a crossing when a train was approaching, and, though there was no actual collision with the train, the escape was so narrow and the danger so alarming that the lady fainted and suffered a severe nervous shock, which produced illness and a miscarriage. The Colonial Court had entered judgment for the plaintiff for the amount found by the jury at the trial of the action brought against the appel-

lants for negligence. The Privy Council reversed this decision. The principal ground of their judgment is formulated in the following sentence: 'Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper.' A judgment of the Privy Council ought, of course, to be treated by this court as entitled to very great weight indeed; but it is not binding upon us, and, in venturing most respectfully not to follow it in the present case, I am fortified by the fact that its correctness was treated by Lord Esher, M. R., in his judgment in *Pugh v. London, Brighton & S. C. Ry. Co.*, 2 Q. B. 248, 65 L. J. Q. B. 521 (1896), as open to question; that it was disapproved by the Exchequer Division in Ireland, in *Bell v. Great Northern Ry. Co. of Ireland*, 26 L. R. Ir. 428, 11 Am. Neg. Rep. 256 [1890], where, in the course of his judgment, Palles, C. B., gives a reasoned criticism of the Privy Council judgment, which, with all respect, I entirely adopt; and, lastly, by the fact that I find that the judgment has been unfavorably reviewed by legal authors of recognized weight, such as Mr. Sedgwick [*Damages* (8th Ed.), p. 861], Sir Frederick Pollock [*The Law of Torts* (6th Ed.), pp. 50-52], and Mr. Beven [*Negligence in Law* (2nd Ed.), pp. 76-83]."

This court would possibly feel itself bound, notwithstanding all this adverse criticism, in a case where the facts were strictly analogous to those under consideration in *Victorian Railways Com'rs v. Coultas*, 13 App. Cas. 222, 57 L. J. P. C. 69, 11 Am. Neg. Rep. 255, to follow that decision. But I do not think they would be disposed to in any sense enlarge the principle underlying that decision or apply it to facts so essentially differing from those there considered as the facts do in the case now before us. Here there was a violent collision brought about by the negligence of the defendant railway company and occasioning injuries to a passenger being carried by that company.

There was sufficient medical and other evidence to justify the jury, properly directed as in my judgment they were, in holding that the plaintiff had sustained injuries arising from the shock or collision. Unless the trial judge should have directed the jury to "divide the physical damages from the mental shock," there was no misdirection and could be no complaint as to the damages assessed.

I do not think any such direction would, under the circumstances, have been proper, nor am I able to see how any such division could

have been made by the jury without entering into the domain of absolute conjecture.

If the railway company by the negligence of its servants causes a collision between two trains or cars which results in injuries to one of its passengers, they are admittedly liable for all such damages as are the reasonable and natural results of their negligent acts. I am quite unable to understand why injuries to the nervous system should be excluded from consideration in assessing such damages. Such injuries are as much the reasonable and natural results of the negligence which causes or is responsible for a railway collision or accident as physical injuries, such as broken bones, crushed or bruised or lost limbs, or loss of sight or hearing or other physical sense. The nervous system is just as much a part of man's physical being as the muscular or other parts and equally, if not more, important. In all cases the question of material injury having been caused the passenger or injured one must be a question of fact. Bodily injuries are not necessarily observable and cannot always be diagnosed or defined with legal accuracy or precision. But the results or effects may be perfectly well known and describable. Many of what are called physical injuries are altogether internal and not even to modern medical science observable. Indeed, the worst injuries are too often such. Injuries may consist of broken bones, crushed or torn muscles, or sinews, injured or ruined eye-sight, hearing or memory. These can, with some approach to certainty, be observed and described. But injuries may, as we all know, be not physically observable, and may result in a complete or partial collapse of the nervous system. In the latter cases, the results are frequently more deplorable and injurious to the unfortunate man than are the injuries physically observable or ascertainable with medical certainty. Medical men may call the results by what scientific term they please. But if they are such as incapacitate the injured one from earning his living or enjoying life as he was accustomed to, or subject him to constant or intermittent attacks of pain or incapacity, is the negligent carrier to be excused from liability because it may be successfully contended that the injurious results are wholly or partially to the nervous system and are not observable on the physical system? True, it is, there is danger of simulation, and in some cases of possible self-deception, resulting in imaginary ailments and claims. But in any and all cases they must in the last analysis be reduced to questions of fact for the court and jury to determine. The danger from simulation or imaginary claims may call for the closest and most exhaustive examination, but would not justify the court, in cases where the liability of the company

for damages was established, in exonerating the negligent company from liability.

All I am contending for is that actionable negligence on a carrier's part resulting in injuries arising out of a collision or impact extends as well to those injuries which may be classed under the head of, or as the result of, nervous collapse or prostration, as to those of a strictly physical character. It is, of course, essential that the injuries, whether nervous or physical, should be the natural and reasonable result of the carrier's negligence, but the mere fact of these injuries being physical or nervous cannot affect the liability. The ease with which in the one case the damages are capable of being ascertained, and the difficulty which in the other case may frequently arise, cannot be made the test of liability. That test must be based upon the negligence causing the collision or accident, and the proof of the alleged injuries being a natural and reasonable result from such negligence.

We are not obliged in such a case as the one before us to apply the rule as to remoteness of damages adopted in the *Coultas Case* [Victorian Railways Com'rs v. Coultas], 13 App. Cas. 222, 57 L. J. P. C. 69, 11 Am. Neg. Rep. 255, to the facts the Judicial Committee had before them. I do not think we would be justified in doing so, as the cases can be so easily and satisfactorily distinguished. In yielding to the defendant's contention we would be giving a dangerous and improper extension to the rule there laid down, which, as I understand the decision, was confined to "damages arising from mere sudden terror unaccompanied by any actual physical injury." I have no hesitation in holding that the trial judge and the Court of Appeal were right, and that this appeal should be dismissed.

IDINGTON, J. I think this appeal should be dismissed with costs.

DUFF, J. The respondent was a passenger on a car on the appellant company's railway when it came into collision at a level crossing with a locomotive engine of the Grand Trunk Railway Company. The only point in controversy at the trial related to the question of damages. The respondent's evidence, which in this respect was not contradicted or seriously attacked, was to the effect that when the collision occurred he was seated and in the seat nearest the motorman, but facing the rear end of the car; that having noticed people hurriedly leaving the car he was turning to look forward to see the cause of the disturbance when the collision occurred as the result of which he was thrown violently forward and across the back of the seat

opposite to that in which he was sitting. He further said that, without assistance, he got off the car and after walking some distance, to use his own words, "he simply collapsed" and could go no further. He took another car to the office, where he was engaged as book-keeper, but feeling he was unfit to work went home, and called in a physician. He was unable to return to his duties for five weeks and between the time of the accident (October, 1908) and the trial (March, 1910), there were 37 weeks during which he was unable to work. He said that immediately after the accident he suffered "pains all over his body," and that he then—at the trial—"was a wreck." He had pains all over his limbs. "My shoulders, my legs, my feet and up to the knees as a rule are like in cold water. I have no energy or will-power to do anything scarcely." Prior to the accident the respondent, who was 68 years of age, had, according to his own statement, enjoyed the normal health of a man of his years.

The medical testimony was given by two witnesses, one called by the respondent and one by the appellants. The effect of the evidence of Dr. McPhedran called by the respondent, was that he was suffering from neurasthenia, the result of a nervous shock which might have been due and in his opinion was due, to the physical jar described by the respondent as received in the collision. There was no express testimony that the respondent had experienced any fright. When asked at the trial what his sensations were, he said: "I thought I was going to be smashed up." Then in answer to a question from the learned trial judge, "I suppose you had not much time for sensations?" he said: "There was no time to think." On his examination for discovery the respondent stated that his illness was due to "nervous shock;" and at the trial he admitted that "so far as he knew" his answers given on that examination were "practically true."

Dr. Johnson, the medical witness called by the appellant, did not dispute the opinion of Dr. McPhedran that the same neurasthenic condition might arise from the physical shock to the system caused by such a jar as that experienced by the respondent, but stated that when examined by him some time before the examination made by Dr. McPhedran, the respondent was not suffering from neurasthenia and there were no signs of any injury to his nervous system.

The learned trial judge was asked to direct the jury in estimating the damages to distinguish between the injury suffered by the respondent in consequence of the shock to his nervous system in so far as it arose from fright and the injury due to the physical jar; and the appeal is based on the refusal of the learned Chief Justice to give such a direction.

I think that the learned Chief Justice was right in his refusal. The only evidence on the point, the uncontradicted evidence of Dr. McPhedran, was quite positive to the effect that it would be quite impossible to distinguish a neurasthenic condition caused by fright from such a condition caused by physical jar. The same condition might be produced by either cause. That being the case—assuming there was evidence of fright sufficient to entitle the jury to say that the respondent's condition might in some degree be due to the mental disturbance—it is quite clear that the jury would have no means whatever of apportioning the consequences as between the two concurring causes and to direct them to do so would simply be directing them to go through a process which as a tribunal, acting judicially and therefore reasonably, they would be incapable of doing. There was, however, in my judgment no evidence which would justify the jury in attributing the respondent's condition to the direct effect of mental disturbance. The respondent himself is unable to give (and quite naturally) any very accurate account of his mental experiences during the critical moment. His statement that his illness was due to "nervous shock" is quite consistent with the notion that its exciting cause was purely physical; and his statement that he "expected to be smashed up" does not seem necessarily to imply any such mental disturbance as would affect his physical condition.

The medical witness for the company did not say, and it is clear that on such vague evidence he could not say, that mental shock experienced by the plaintiff arising from an expectation of being injured would account in any degree for the injury his nervous system sustained. It is obvious that having another circumstance, the physical jar, which would definitely account for that condition, it was impossible to say that a state of mind so indefinitely described had anything whatever to do with it.

In these circumstances it is quite clear that the learned trial judge would have erred if he had suggested to the jury that they should attempt to ascertain and designate some definite proportion of the damages suffered as attributable to the plaintiff's state of mind.

In this view of the case it is quite unnecessary to analyze closely the decision of the Privy Council in the Coultas Case [Victorian Railways Com'rs v. Coultas], 13 App. Cas. 222, 57 L. J. P. C. 69, 11 Am. Neg. Rep. 255.

I do not think there is anything in that case remotely countenancing the contention that where there is a physical blow sufficient to account for nervous conditions which might also have been produced by fright, if there was fright, accompanying the blow—that in such a case the

jury must attempt the absolutely impossible task of separating the results arising on the one hand from the physical impact from those arising from mental disturbance on the other.

ANGLIN, J. In view of the manner in which the Coultas Case [Victorian Railways Com'rs v. Coultas], 13 App. Cas. 222, 57 L. J. P. C. 69, 11 Am. Neg. Rep. 255, and the doctrine for which it is supposed to stand have been dealt with in recent English and Irish decisions, it should, I think, be followed only in cases in which the facts are distinguishable from those there considered by the Judicial Committee. We are not bound by the views expressed by the Ontario Court of Appeal in *Henderson v. Canada Atlantic Ry. Co.*, 25 Ont. App. R. 437, and if they imply any extended application of the principle of the Coultas Case, I must, with deference, decline to adopt them. The decision of this court in the *Henderson Case*, 29 Can. S. C. R. 632, does not at all affect the question now before us. I respectfully concur in the statement of Pilles, C. B., in *Bell v. Great Northern Railway Co.*, 26 L. R. Ir. 428, at p. 442 [11 Am. Neg. Rep. 256, at p. 257]: "I am of the opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down as a matter of law that if negligence causes fright, and such fright in its turn so affects such structures as to cause injury to health, such injury cannot be a consequence which, in the ordinary course of things, would flow from the negligence, unless such injury accompanied such negligence in point of time."

I agree with Garrow, J. A., that no one can object to the general principle enunciated at p. 225 (of the judgment of the Judicial Committee in the Coultas Case, 13 App. Cas. 222, that the "damages must be the natural and reasonable result of the defendant's act; such a consequence as in the ordinary course of things would flow from the act;" but I am unable to understand the argument for the appellants that the damages sought to be recovered in the present case are not a natural and reasonable result of the negligence charged against the defendants. The Coultas Case, 13 App. Cas. 222, 57 L. J. P. C. 69, 11 Am. Neg. Rep. 255, should not, in my opinion, be held to preclude recovery where there has been actual impact to which a jury might not unreasonably ascribe the injuries complained of, or where, without actual impact, a passenger being carried by a common carrier has, through the negligence of such carrier, sustained a serious mental or nervous shock due to fear of immediate personal injury to him-

self from such negligence (*Dulieu v. White*, 2 K. B. 669 (1901) at p 675), the injurious physical consequences of which have been established and have been sufficiently shown to be the result of that negligence.

There was in the present case no evidence upon which the jury could be asked to distinguish between damages sustained by the plaintiff because of purely mental injury, and damages which he sustained from physical injury due to mental or nervous shock. The right to recover for injury of this latter class is established by many English and American authorities, and, in the circumstances of the present case, it is not precluded by the decision of the Privy Council in the *Coultas Case* [*Victorian Railways Com'rs v. Coultas*], 13 App. Cas. 222, 57 L. J. P. C. 69, 11 Am. Neg. Rep. 255.

There certainly was evidence that the plaintiff had suffered and was suffering actual physical injury, whether its cause was mental or physical shock, and there was also evidence, as pointed out by Garrow, J. A., that his condition was due in part at least to actual physical shock. In either aspect he was entitled to recover, and the learned Chief Justice of the King's Bench was, in my opinion, fully justified in declining to ask the jury to refine between mere mental injury and physical injury due to mental shock or between the latter and physical injury due to physical shock. Indeed, since physical injury, whether due to mental or to physical shock, would entitle the plaintiff to damages, there could be no object in drawing the latter distinction.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

PENNEBAKER et al. v. SAN JOAQUIN LIGHT & POWER CO.

[SUPREME COURT OF CALIFORNIA, NOVEMBER 18, 1910.]

158 Cal. 579, 112 Pac. 459.

1. Electricity—Duty of Company—Fires.

It is not the duty of an electric light and power company to turn off the electricity from a district from which a fire alarm has been sent in, but it is enough if it is ready to cut off the current when necessity arises and on notice from the proper authorities.

2. Electricity—Negligence—Wires.

An electric light and power company, which fails to send an employee to the scene of a fire to disconnect wires, or signal for the disconnection of the district, is not chargeable with negligence, in the absence of an ordinance imposing such duty upon it.

3. Electricity—Negligence—Fallen Wires—Fires.

Negligence is not imputable to an electric light and power company because its employees who were spectators at a fire, failed to disconnect fallen wires.

4. Electricity—Wires—Liability—Death of Fireman.

The failure of an electric light company to disconnect wires, carrying but 260 volts, which were cast to the ground on private property by the burning of a building, of which it had no notice, does not render it liable for the death of a fireman who stepped upon the wires.

5. Electricity—Fireman—Notice—Negligence.

A fireman who goes among electric light wires which have fallen from a burning building, knowing that they are charged with a deadly current, is guilty of negligence which will bar a recovery by him from the electric light company owning and maintaining the wires.

6. Evidence—Negligence—Electricity—Wires—Death of Fireman.

A report made by the city electrician to the board of trustees, concerning an arrangement with an electric light and power company, that the latter would cut off the current on request of the proper authorities, in case of fire, is admissible on the question of negligence in an action brought against the company to recover damages for the death of a fireman who stepped upon a deadly wire.

Appeal by defendant from a judgment of the Superior Court of Fresno County, rendered in favor of plaintiffs in an action brought by the widow and minor child to recover damages for the alleged negli-

NOTE.

Duty to cut off Electric Current at
Time of Fire.

The only authority which has been

found on the question of the duty of one supplying electric current to cut off connection in case of fire, is New Omaha Thomson-Houston El. Light Co. v. Anderson, 73 Neb. 84, 17 Am. Neg.

gent killing of their intestate, Carl G. Pennebaker, by a shock from a fallen electric wire. Reversed.

For appellant—Frank H. Short and F. E. Cook.

For respondents—Larkins & Feemster.

HENSHAW, J. This appeal is from the judgment and from the order denying defendant's motion for a new trial. The action is by the widow and minor child, heirs of Carl G. Pennebaker, for damages resulting from his death. Pennebaker was a member of the fire department of the city of Fresno. A fire occurred about two o'clock in the morning in a wooden building on the outskirts of the business portion of the city. Pennebaker, in the performance of his duty, went to the fire to help in extinguishing it. The complaint charged: That an alarm of fire was turned into and given the fire department of the city, and at the same time, "so plaintiffs are informed and believe, and upon such information and belief allege the fact to be, an alarm of said fire was turned into and given said defendant at its electric substation in said city. That by said alarm, so plaintiffs are informed and believe, and upon such information allege the fact to be, defendant was notified of the existence and apprised of the location of said fire." The complaint further charged: That wires, carrying powerful and deadly currents of electricity, were maintained by the defendant at and in the building which caught fire. That the fire continued to burn for the space of about 40 minutes after the alarm was turned in. These wires were thus burned from their fastenings and fell to the ground soon after the alarm was given, continued to lie upon the ground during the greater part of the time that the fire was so burning, and while so lying upon the ground continued to be charged with electricity in dangerous and deadly quantities. That defendant neglected and carelessly permitted its wires so charged to lie upon the ground where it was necessary for persons to go and to be for the purpose of combating and extinguishing the fire. "That defendant, although notified of the existence, and apprised of the location of the fire, as aforesaid, and well knowing of the existence of its said wires at said place, and having the entire charge and control of said wires and of its said electricity and currents of electricity, and well knowing that

Rep. 601 (1905), in which it appeared that a fireman was killed by a current of electricity from one of defendant's electric light wires passing down a ladder, which had a metal connection

from the top to the bottom capable of carrying electric current, and which he and others were using at the time of a fire. On the subject of the duty to remove electric light wires, a city

its said wires were then and there charged with and carrying currents of electricity, and well knowing that said wires were, in the event of a fire, liable to be burned from their fastenings, and to fall to the ground and endanger the lives of people, and particularly of persons engaged in fighting the fire, and having full and ample time and opportunity to know and ascertain the condition of said wires at said time and place, and having ample and sufficient time and means to turn off said electricity and to cut said wires, and to render the same safe and harmless, negligently and carelessly failed to cut said wires, and negligently and carelessly failed to turn off said electricity, and negligently and carelessly failed to do any thing whatever, to render said wires, or any of said wires, safe and harmless during the time of said fire and while its said wires were down and lying upon the ground, as aforesaid." Issue was joined upon the material averments of negligence, and for an affirmative defense the contributory negligence of Pennebaker was charged. The cause was tried by the court without a jury, and the court gave judgment for plaintiffs; its findings conforming exactly to the allegations of the complaint.

The principal contention advanced upon this appeal is that the evidence introduced by plaintiffs, giving to it the fullest weight, utterly fails to show negligence upon the part of the defendant. Appellant contends, for its second proposition, that, if the evidence of the plaintiffs be held sufficient to charge the defendant with negligence, it must be concluded from the same evidence that the deceased was guilty of contributory negligence, and, finally, it is urged that the court erred in its ruling refusing admission to certain evidence proffered by the defendant. A statement of the substance of plaintiffs' evidence is made necessary for a consideration of appellant's contention that it utterly fails to show negligence upon its part.

The evidence disclosed: That defendant, an electric light and power corporation, was under contract to supply, and engaged in supplying, light and power to the municipality of Fresno and to private users and consumers; that at 2 o'clock a. m. a fire was discovered in the building before mentioned. Alarms of fire from two boxes, Nos. 4 and 82, representing contiguous fire districts, were turned in and well-nigh simultaneously. Automatically a signal was thus given in the fire department stations, and a more general signal by the blowing of a

ordinance provided "that all corporations, companies and individuals owning and operating overhead wires shall, in the time of fire, send one or more linemen to the scene of the fire,

who shall report to the chief of the fire department or the city electrician, and they shall disconnect or remove any wires or cables which shall become a menace to life and property."

whistle at a substation of the electric company, about five blocks distant from the actual location of the fire. Each of these fire districts embraced territory of five or six blocks. So that a recognition and understanding of the signal as being from district 4 or district 82 would indicate that the fire was somewhere within one of the five or six blocks embraced respectively in such district. The signal would not, and did not, of course, indicate the building, and would not and did not indicate whether the defendant company had light and power wires that would be affected by the fire, though, of course, there would be imputed to the company knowledge that it had such wires within the district. The firemen arrived promptly at the scene of the fire and proceeded to fight it with water and chemicals. The building was a bicycle repair shop, into which was conducted power used in operating a small lathe. The wires carried electricity which by no possibility could exceed 260 volts; 260 volts are not regarded as dangerous to human life, much less as deadly. These wires were burned and fell to the ground by reason of the fire, and lay upon the ground in the back yard of the premises. Certain of the firemen noticed these wires and saw by their sputtering that they were "hot" and "carried juice." One or two of the firemen actually received shocks from these wires and jumped away. Discussion arose amongst the firemen as to whether the wires were dangerous. The fire chief testifies: "I went around in the back, and there was quite a number of the boys (firemen) had been in the yard and they had come out, and of course they hadn't ought to have come out, and they said the reason they came out was on account of the juice being in there. Others spoke up and said there was not enough in there to hurt anybody, and I went in there and it didn't bother me at all. I didn't feel it. I never got a particle of a shock at all." The fire being subdued in about three-fourths of an hour from the time the alarm was given, the chief gave orders to his men to carry out their hose and other paraphernalia and make ready to disperse. Pennebaker, in the performance of his duty, went into the yard, his feet touched and became entangled in the wires, and he pitched forward unconscious. He was dragged out by his fellows, never recovered consciousness, and died within an hour. The chief of the fire department testified that he saw one or more of the employees of the defendant at the fire, but it is not shown that they were on

In behalf of the plaintiff it was claimed that under this ordinance it was the duty of the defendant to have a line-man at the fire to decide at its peril what wires were a menace to life and

property, and if any were found to be so, to remove them. It was, however, held that the firemen were, as to the defendant electric company, mere licensees, who must, at their own risk,

duty, were charged with any duty, were informed of or knew that the wires were carrying electricity or even that they were there when the wires were carrying electricity, for in a very few minutes after Pennebaker was struck down the city electrician climbed the pole and cut the wires. The city was divided by the defendant into districts, and the light and power from these districts could be turned off at the substation. A man was maintained there day and night to do this, upon proper demand. No demand or request was made in this instance. The effect in turning out the light in any one of these districts would be to leave it entirely without electric light or power. Pennebaker was a vigorous man in the prime of life.

The foregoing is a fair summarization of all the evidence upon the question of negligence presented by plaintiffs. It is the evidence to which the motion for nonsuit was addressed. It is to be noted that no knowledge was brought home to defendant that the fire had disturbed, or would in any way disturb, its wires; that, if knowledge that there was a fire and the general location of that fire was imputable to defendant by the blowing of the whistle, such knowledge, in the nature of things, could tell them no more than that it was in a district comprising five or six blocks. No knowledge was imputed or was imputable to defendant that the fire was even in a building containing its wires. It is to be noted, moreover, that the wires, whose detachment caused the fatal accident, did not fall upon any public way, but in the back yard of private property. Respondent contends, and the trial court took the view, that this uncontradicted evidence was legally sufficient to establish the negligence of defendant. If it did, it can be put upon one or another of two theories, both of which are advocated by respondent. First, that it was the duty of defendant to have disconnected its wires when the fire alarm was sounded. Second, that it was the duty of defendant to have an employee at the fire, either to disconnect the wires himself or to signal to the substation to have it done. A third theory of respondent, broader perhaps than either of these, is that by the very happening of the accident, under the indicated circumstances, the law imputes negligence to the defendant, and that therefore the nonsuit was properly denied. This is an invocation of the doctrine of *res ipsa loquitur*.

enter the premises in the condition in which they may find them, and that under the ordinance the lineman required to be furnished by the electric company at the time of the fire, acted, not as the agent of the defendant, but

was under instructions from the fire chief and city electrician, who were in sole charge of the matter of cutting wires, and that defendant, therefore, could not be chargeable with any negligence in that respect.

1. In support of the first contention, no authority is cited, nor do we think any can be. It would compel defendant, upon the one hand, to extinguish all light and power in a district, regardless of the necessity of so doing, or be held liable for any consequences that might follow its failure. It takes no account of the fact that by so doing, in the case of a night fire, a district would be left in complete darkness, and that under such circumstances, following the alarm of fire, panic might ensue in hotels, lodging houses, and residences, and that the resulting damage might far exceed that which the extinguishment of the lights was designed to prevent. No such rule of law exists, nor, we take it, will ever exist, and the utmost that will be exacted of lighting companies in this regard is that they shall hold themselves in readiness to cut off the electricity when the necessity arises and they are informed of it by proper authority.

2. Nor is negligence imputable to the defendant because it did not have an employee at the fire, charged with the duty of disconnecting particular wires, or signaling for the disconnection of the district. Any reasonable ordinance in this regard which a municipality might adopt, would, of course, be upheld, and, if injury resulted from the negligent failure of the light and power company to obey the terms of such ordinance, undoubtedly negligence would be predicated upon it. But here no such exactions were required by ordinance, and it cannot be held that the defendant failed in any duty with which the law charged it in not having such employee in attendance at every fire. Indeed, in *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84, 17 Am. Neg. Rep. 601, 102 N. W. 89, where an ordinance required electric companies to send one or more competent linemen to fires to report to the city engineer and remove or disconnect wires where directed, the court held that this imposed no further duty upon the company than that of so doing, and that the company was not liable, even when it was shown that the company's linemen invited the firemen to proceed to lower the ladders, declaring that the wires with which it thereupon came in contact, and which proved to be heavily charged, were "dead." The court ruled that his declaration to that effect, being entirely outside of the line of his duty, could not charge the defendant company; that defendant light company owed no duty to the firemen to warn them of danger either in ascending or descending the ladder or in removing it from between the wires after the fire was extinguished. This was a duty, if such duty existed, which, under the ordinance pleaded, devolved upon the officers of the city. See, also, *Trouton v. New Omaha Thomson-Houston Elec. Light Co.*, 77 Neb. 821, 110 N. W. 569. This same reasoning and authority

answer the argument of respondent that employees of the defendant were at the fire that night and saw the fire and "undoubtedly the flashing of the electricity and the conditions of the wires, yet they did nothing." In addition to what has been said in this regard to the effect that they were not there in the performance of any duty, and that it is not shown that they were there when the wires were charged with electricity, respondent's argument for a still further reason, is *felo de se*. For if defendant's employee, a mere bystander and looker-on, can be charged with knowing the electricity in dangerous quantities was escaping from his employer's wires, how much more is Pennebaker himself charged with this knowledge, when he was a fireman, in the immediate vicinity of the wires, when some of his fellow firemen had received shocks, when the matter had been discussed amongst them, when a cry of danger had been given, and when in the resulting conversation it had been argued that the wires were not carrying power enough to injure anybody. Clearly, if knowledge of a dangerous condition arising out of the presence of the electric current in the fallen wires was chargeable to an employee of defendant, under these circumstances, it was even more chargeable against Pennebaker, and the conclusion would be unanswerable that his own negligence, after such knowledge, proximately contributed to his death.

3. The third theory, and that perhaps most strongly relied upon by respondent, is that the facts proved established negligence *per se*. Herein much reliance is placed upon the decision of the Supreme Court of Missouri in *Gannon v. Laclede Gaslight Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505. This decision was rendered by a divided court. While there are expressions in the prevailing opinion in accord with respondent's contention, the real question decided was quite different. The action, like the one under consideration, was to recover damages for the death of a husband and father, himself a fireman. The proof by plaintiff was merely to the effect that the deceased, while in the performance of his duty as a fireman, at a fire, was killed by coming in contact with heavily charged wires of defendant company lying in a public alley. In its essence the proof went no further than this. The defendant company showed that the wires were burned through, or their attachments burned down, through no fault of its own, by an accidental fire; that it received no notice; and, indeed, that there was no time between the falling of the wires and the accident in which it could have received notice so as to cut off the current. It made this proof full and complete by unimpeached witnesses and uncontradicted testimony. The verdict of the jury was for plaintiff. The Supreme Court was divided, not at all upon the question

whether or not the defendant company had made full and complete defense; that was admitted; but upon the question whether or not the jury was bound to believe and decide in accordance with the evidence of the defense, a bare majority holding that the jury alone were triers of the fact, and that a court of appeals would not reverse a case and override the verdict if the evidence proved unsatisfactory to the jury, however unsatisfactory it might be to the court, the minority of the court holding that such a rule gave juries uncontrolled liberty to disregard and reject evidence which, under the circumstances, it was their duty to have accredited.

This was the principal point of controversy between the members of that court. In the prevailing opinion, it is true, language is used, upon which respondent here relies, which would make not only electric light companies, but every other person using a street, saving foot passengers, absolute insurers in case injury resulted to person or property. An instance of such a declaration is found in the following language: "It was a matter of the plainest duty for the defendant to see that the streets and alleys of the city, along which by permission it was suffered to place its overhead wires for its own private gain, were at all times maintained in the same condition as to safety from the danger of electricity as they were before its overhead use thereof was begun." Every added vehicle upon the street of a city increases the danger to pedestrians in the use of the street. Every street car does the same. Every suspended sign has like effect. If it be true that in all these, and in the innumerable other instances which might be cited, the street must be as safe after as before the new use, then it must necessarily follow that the user becomes an absolute insurer. If that is what the Supreme Court of Missouri means, it must suffice to say that it stands alone in its opinion, without reason or authority in its support. 1 Thompson Law of Neg. § 802; 15 Cyc. 472. If, however, the Supreme Court of Missouri meant but to declare that where the wires of an electric light company, heavily charged with electricity, are shown to be lying upon a public street and injury to a person lawfully upon the highway results from these wires, without negligence on his part, a presumption that the company is negligent thus arises, and the burden is cast on it to overcome this presumption, the principle of law thus declared is one over which there need be no discussion, for it is not pertinent or applicable to the present case. Here, no wires were upon the public street. They were upon private property and were cast to the ground by the burning of the building upon that property. In the absence of ordinance or statute changing the common-law rule in this regard, a fireman

entering a building under imperative public necessity is but a licensee, who assumes the risks as he finds them, and to whom the owner of the premises owes no special duty to maintain those premises in a safe condition. *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84, 17 Am. Neg. Rep. 601, 102 N. W. 89; *Woodruff v. Bowen*, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198; *Hamilton v. Minneapolis Desk Mfg. Co.*, 78 Minn. 3, 6 Am. Neg. Rep. 575, 80 N. W. 693, 79 Am. St. Rep. 350; 21 Am. & Eng. Ency. of Law (2d Ed.) 475. We would not from this be understood as holding that, in all cases, where the owner is exonerated, an electric light or power company, using the building as a means of transmitting into or over it power in dangerous quantities, would also be exonerated. A broad distinction might often exist between the duty of the owner, who had no control over the dangerous current, and the responsibility of the company using the building for the transmission of the dangerous force, and whose duty therefore it was to control it in all proper ways. So, in the very case at bar, the owner, having perhaps little knowledge of the force, and less of methods of its control, might well be held nonliable where dereliction of duty might be charged and consequent liability might be imposed upon the electric company, if, after knowledge of the dangerous condition, it failed promptly to remedy it. But, under the facts here stated, such knowledge was not brought home to it, and it was not chargeable with this knowledge as matter of law.

It should be repeated that in this case there is no question involved of deadly wires lying in a street, to the imminent danger of the traveling public. There is no question of faulty installation or operation. Moreover, the defendant, if chargeable with everything else, could not be charged with the maintenance of deadly wires, since, notwithstanding the fact that the current which they carried caused the death of Pennebaker, and in this sense they proved deadly, a defendant's conduct is to be judged by the ordinary knowledge of mankind, and it is in evidence that 260 volts was the utmost which the wires could have carried, and that the shock of 260 volts is not regarded as at all dangerous to human life. It is not shown, therefore, that the defendant in this case failed in any duty toward the deceased which was imposed upon it by law. If it has not failed in such duty, it is not legally responsible for his death.

4. The court's ruling in rejecting offered evidence, of which appellant complains, was error. This evidence consisted of a report made by the city electrician of the city of Fresno to the board of trustees, showing that the water and light committee of the Fresno city council

"to which was referred the matter of having cut-off switches installed for controlling electric currents in case of fire, reported a meeting with the officers of the San Joaquin Power Company, at which they explained that every circuit in town could be controlled from the power house, and that they had made arrangements with the telephone company whereby the fire chief, or city electrician, by asking the chief operator of the telephone company for the power house, would be given the line immediately, and that the current could be shut off quicker and with a great deal more safety in any district of the city by an attendant at the station." This report was by the trustees of the city adopted and placed on file. It was offered to be shown that the city electrician had, upon occasions of fire when the exigencies of the case in his judgment called for it, requested the cutting off of a district, and the request had always been promptly complied with. And it was offered to be shown, moreover, that the company always maintained a competent man at its substation for the purpose of doing this very thing, and that on the occasion of this fire no request so to do had been made. In fact, the electrician arrived at the fire, cut the wires himself, but, unfortunately, a few minutes after Pennebaker met his death. The evidence was rejected apparently upon the theory that it did not amount to a by-law or ordinance or regulation of the city, and so could not operate to change the defendant's legal duty toward the deceased. In this view the court was clearly in error. If the converse of the proposition had been sought to be proved, namely, that with the existence of such an understanding the company had failed upon proper request to disconnect the wires, it would not be doubted that it would furnish strong evidence of the company's negligence. Here, if it be conceded that the understanding or arrangement or agreement or convention of the parties did not have the legal effect of a municipal by-law, it was competent nevertheless to show that it was an accepted regulation by the municipal authorities of the duty of defendant in the matter of fires, that it was an agreement which had been put in force, and which had always been lived up to by the company. The evidence would certainly have a strong tendency to show that in this respect the company was not delinquent in the performance of its duty, and for this purpose and to this extent it should have been admitted and weighed.

These considerations cover all the matters called to the attention of the court, and for the reasons hereinbefore given the judgment and order appealed from are reversed, and the cause remanded.

LORIGAN, J., and MELVIN, J., concurred.

Hearing in Bank denied.

BEATTY, C. J., dissented from the order denying a hearing in Bank and filed the following opinion on December 17, 1910:

I dissent from the order denying a rehearing of this cause.

It is here decided, among other things, that the Superior Court erred in sustaining the objection to the defendant's offer to prove the adoption by the board of trustees of the city of Fresno of the following report of the city electrician:

"To the Honorable, the Board of Trustees of the City of Fresno:

Gentlemen:—The undersigned, the city electrician of the city of Fresno, herewith submits for your consideration his report for the month of December 30, 1905, as follows, to wit:

" 'On the 13th the water and light committee met representatives of the Power Company in my office to decide on some safe and practical method of handling dangerous wires at fires. It was agreed that by giving the right of way over all others to the telephone lines, to the city electrician and fire chief, that the current could be shut off quicker and with a great deal more safety in any district of the city, by the attendant at the station. As with switches, it would be necessary to pull at least two to kill the line, and it would be necessary to climb the poles to do so. And besides, it is possible that the switch pole might be in range of the fire, in which case the switch would be useless.

" 'Respectfully submitted,

" 'C. T. McSHERRY,

" 'City Electrician.' "

If this report had been offered by the plaintiffs in support of their case I think it would have been harmful error to have excluded it, for it would have proved in their favor that the necessity of providing "some safe and practical method of handling" the wires of the defendant carrying dangerous voltage in case of fires had been recognized and considered both by the city authorities and by the defendant—that it had been agreed that a proper measure of precaution in such case would be the cutting off of the circuit (*i. e.*, the district) affected and that the defendant's plan of cutting out the whole district at the substation had been adopted in preference to the alternative plan of providing local switches within the various districts. This, in connection with abundant evidence that the defendant's agent at the substation, knowing that a fire had started within five or six blocks of the station, and in a district to which its wires extended carrying a voltage which the event proved to have been deadly to a

grown man in apparently sound health, had neglected for forty minutes after the alarm of fire to adopt the precaution suggested by defendant itself and claimed to be the safest and most practicable, would have made out a clear case of highly culpable negligence—unless the adoption of the electrician's report can be construed as a valid agreement exempting the defendant from any obligation to cut off the current from a circuit where a fire might be raging until its agent at the substation should be requested to do so by the city electrician or the chief of the fire department. This indeed seems to be the view of the court, and, as appears from the opinion, is the ground upon which the ruling of the Superior Court is condemned. It is from this view that I dissent. It is perhaps a just inference from the terms of the report that its author assumed it to be a part of the duty of himself and the fire chief to the public (but not to the defendant) to give prompt notice of the occurrence and locality of the fire to the persons in charge of the defendant's substation, but this did not exempt the defendant from the duty of acting promptly upon the same notice coming from any other person or in any other form. That they had such notice, and neglected to act upon it with reasonable promptitude was in my opinion amply proved, and it was no error as to the defendant to exclude the electrician's report and proof of its adoption, since it had no tendency to prove that the neglect to shut off the current at the station was excused by the failure of the fire chief and electrician to make the request.

I do not think this court can on the evidence set aside the finding of the trial court as to contributory negligence.

As to the status of a fireman who enters a burning building in a city in the vicinity of other buildings for the purpose of extinguishing the fire or saving life or property it may be that the liability of the owner for any injury received by him while on the premises is no other or greater than it would be to a mere licensee, but the fireman is not there as a licensee of the owner; he is there in performance of his duty as a public servant under the authority and protection of regulations clearly within the police power of the State, and of superior force to the will of the owner of the premises; and he is entitled to the same indemnity for injuries caused by the culpable negligence of others as if he were on a public street.

As to the comparative harmlessness of less than five hundred volts *res ipsa loquitur*: Either these wires carried more than five hundred volts, or less than that voltage, though harmless to most men, is deadly to some—and those few are entitled to protection. And, finally, the argument based upon the serious dangers (of panic, etc.) involved in

the cutting out of a circuit on an alarm of fire does not appear to consist very well with the choice of a plan of handling its dangerous wires suggested by the defendant itself and approved by the city trustees, which was nothing less than a means of transmitting prompt notice of the outbreak of a fire to the substation and the cutting out of the circuit.

Upon this view of the case the question presented by the appeal is not whether it can be held as a matter of law that it was culpable negligence on the part of the defendant to wait for official notice of the danger before adopting any precaution against it, but is on the other hand whether it can be held as a matter of law that under the facts disclosed by the evidence there was no culpable negligence. Negligence is a question of fact and not of law except in those cases where upon the facts found or proved there can be no reasonable difference of opinion as to the absence of culpability. In this case the judge of the trial court, performing the functions of a jury, has found that there was negligence. I do not think that his conclusion was unreasonable. At least I think the case is deserving of further consideration.

GILA VALLEY GLOBE & NORTHERN RAILWAY CO. v. HALL.

[SUPREME COURT OF ARIZONA, JANUARY 14, 1911.]

13 Ariz. 270, 112 Pac. 845.

1. Master and Servant—Track Velocipede—Injuries—Evidence.

A finding that the injuries sustained by one thrown from and run over by a track velocipede operated by a gasoline engine, were due to a badly worn wheel, is justified by proof that the car left the track just after turning a curve and when it was forced against the rail on which the defective wheel was running.

2. Master and Servant—Assumption of Risk—Defective Wheel.

One inexperienced in the use of a track velocipede, does not, as matter of law, assume the risk of injury from a worn wheel, where the danger was not known or plainly observable.

3. Evidence—Notice—Track Velocipede—Defective Condition.

A remark by a person as to the condition of a defective wheel on a track velocipede, is inadmissible to charge with knowledge of the defect, one who rode on the velocipede which was operated by another, where the remark is not shown to have been made in his hearing.

4. Trial—Damages—Remittitur.

A trial court has the power, where excessive damages have been allowed, and the motion to set aside the verdict is based on that ground, to make a remission a condition precedent to overruling the motion, even where the damages are unliquidated.

5. Trial—Damages—Remittitur.

The trial court may require a remittitur of excessive damages as a condition of refusing a new trial, where the excessive verdict is due to the liberality of jurors rather than to prejudice or passion.

Appeal by defendant from a judgment of the District Court of the Fifth Judicial District in and for Gila County, rendered in favor of plaintiff John Hall, in an action brought to recover damages for personal injuries alleged to have been caused by a defective wheel on a track velocipede. Affirmed.

For appellant—Eugene S. Ives, and S. L. Pattee.

For appellee—A. C. Baker, and Stoneman & Jacobs.

NOTE.

On the general subject of Assumption of Risk, see notes in 4 Am. Neg. Rep. 300; 5 Am. Neg. Rep. 23; 7 Am.

Neg. Rep. 72, 97, 588; 8 Am. Neg. Rep. 71, 90, 183, 638; 9 Am. Neg. Rep. 196, 280, 306, 467; 10 Am. Neg. Rep. 212, 291.

CAMPBELL, J. Appellee was in the employ of appellant as chain-man. On April 23, 1907, he was engaged with another employee named Ryan, in measuring distances, locating mile posts on appellant's line of railway. For that purpose they used a three-wheeled velocipede furnished by appellant. This velocipede was of the kind ordinarily used in work of this character, with a gasoline engine for motive power. It had two wheels on the right-hand side, over which was the engine, and seat for the use of the operator, and a seat in front for another person. The third wheel was a small wheel on the left-hand side nearly opposite the front wheel on the right-hand side, and fastened to the machine by a bar extending across the track. On the day mentioned, Hall and Ryan were upon this velocipede on plaintiff's line of railway, Ryan operating the machine and Hall sitting in front. While the velocipede was going at a speed of from 8 to 12 miles an hour, it suddenly left the track, going to the left, the side on which was situated the one small wheel. Hall was thrown in front of it and run over, sustaining severe injuries. This action was brought against the railroad company to recover damages for the injuries so received, it being alleged that the flange on the third or small wheel was worn and cracked, and that by reason of such condition the machine left the track, and that the company was negligent in furnishing such velocipede. Appellant answered denying the negligence alleged, pleading contributory negligence, and that Hall knew or might have known the condition of the velocipede and assumed the risk of the injuries resulting from the alleged defect. The jury returned a verdict for \$10,000. A motion for a new trial was made, and prior to its determination Hall voluntarily remitted \$5,000 from the amount of the verdict. Thereafter, the court denied the motion for a new trial and entered judgment in favor of the plaintiff for \$5,000 and costs. From this judgment and from the order denying the motion for new trial, the railway company appeals.

We shall consider the assignments of error in the order in which they are argued by counsel. It is first insisted that the court should have directed a verdict at the close of the plaintiff's case, for the reason, as contended, that the testimony showed that at the time the velocipede left the track it was going north around a right-hand curve, and therefore, as stated by counsel, "would be impelled by centrifugal force toward the outer rail, and the two wheels on the right-hand side would be held against the rail on that side, and the flange on the left-hand or third wheel impelled away from the rail. The application of this natural law would result in the constant tendency on the part of the machine to keep straight ahead, and thus the

flange on the left-hand side would be kept away from the rail, and its condition would have no effect while going around such a curve, and thus the condition of the flange could have no effect." The testimony shows that the wheel in question was badly worn and gouged, and there is expert testimony to the effect that the tendency of a wheel in such a condition is to mount the rail. It is true that the plaintiff testified that the accident occurred on the curve. However, in another portion of this testimony he states that at the time of the accident the car was just going off the curve on a tangent. The testimony of Ryan, the operator of the car, who later visited and observed the scene of the accident, is: "At the point where the gasoline car left the track, the situation of the road with reference to being curved or tangent, was just coming off a curve, a right-hand curve when the accident occurred." It is argued by counsel for appellee, with much show of reason and supported by testimony of expert witnesses, that in leaving the curve the car was thrown against the left-hand rail, and that the flange of the small wheel, because of its defects, failed to perform its functions. A careful consideration of the whole record convinces us that the jury was warranted in finding that the accident resulted from the defective wheel.

It is further insisted that the court erred in not directing a verdict for the defendant for the reason that the evidence showed that the defects of the wheel were plainly observable, and the danger easily appreciated, and that therefore the plaintiff assumed the risk. It is true that the defects should have been discerned by any one whose duty it was to inspect wheels, but Hall was not an inspector, nor did he have anything to do with the operation of the car. His only connection with it was to ride upon it from place to place, in locating mile posts. Nor does it seem possible to say, as a matter of law, that he should have appreciated the danger had he known the condition of the wheel. He had but little experience with machines of that character. It does not appear that he had ever used any other track velocipede, and it does not appear that he had been employed on the one in question but about 14 hours at the time of the accident. One without experience in such matters might observe that the wheel was worn and yet not appreciate that it was in such condition as to be dangerous. In fact the record in this case discloses a wide difference of opinion among those qualified as experts, as to whether or not an accident was likely to result from a wheel in the condition in which this one was shown to have been. The court did not err in permitting the case to go to the jury.

Appellant contends that the court in the instructions erred in

stating the rule of assumption of risk by an employee, in that it limited the defects, the risk of injury from which the plaintiff assumed, to those which he actually knew or those which were plainly observable to him, and insists that an employee also assumes the risk of those he might or ought to have known through ordinary care. There are authorities which support this contention, but the question is determined to the contrary by our appellate court. "Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employee." *Choctaw, Okla. & Gulf R. Co. v. McDade*, 191 U. S. 64, 15 Am. Neg. Rep. 230, 24 Sup. Ct. 24, 48 L. Ed. 96.

The refusal of the court to permit Ryan, the operator of the car, to testify to a remark made concerning the condition of the wheel, a short time before the accident, is assigned as error. Hall, Ryan, and one Regna were in the neighborhood of the velocipede when Regna commented upon this alleged defect. Ryan was unable to state that Hall took any part in the conversation, could not state how far he was from Regna at the time, and there is nothing in the record to indicate with any reasonable certainty that he heard the remark. Therefore the testimony was properly excluded.

The remaining important question in the case is whether the court erred in rendering judgment for the amount of the verdict less the sum remitted by the appellee. It is insisted by appellant that the court should have granted a new trial for the reason that it is beyond the power of a court to permit a remittitur where the damages are unliquidated and the verdict excessive. The question has heretofore been before this court in two cases. *Southern Pac. R. Co. v. Tomlinson*, 4 Ariz. 126, 33 Pac. 710, was an action to recover damages for death by wrongful act, under a statute permitting the jury "to give such damages as they may think proportioned to the injuries resulting from said death." A verdict for \$50,000 was returned from which the plaintiff remitted \$31,998, and judgment was entered for the remainder. The power of the trial court to permit the remittitur was questioned, but it was held: "A trial court has the power, where excessive damages have been allowed by the jury, and where the motion to set aside the verdict is based on this ground, to make a remission a condition precedent to overruling the motion. The exercise of this power rests in the sound discretion of the court. This doctrine is affirmed in the case of *Arkansas Cattle Co. v. Mann*, 130 U. S. 74, 9 Sup. Ct. 458, 32 L. Ed. 854; also in *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Supt. Ct. 590, 29 L. Ed. 755. Of course, if it is apparent to the trial court that the verdict was the result of passion or

prejudice, a remittitur should not be allowed, but the verdict should be set aside. In passing upon this question, the court should not look alone to the amount of damages awarded, but to the whole case, to determine the existence of passion or prejudice, and to determine how far such passion or prejudice may have operated in influencing the finding of any verdict against the defendant. When the circumstances, as they may appear to the trial court, indicate that the jury deliberately disregarded the instructions of the court, or the facts of the case, a remittitur should not be allowed but a new trial should be granted. If they do not so indicate, and the plaintiff voluntarily remits so much of the damages as may appear to be excessive, the court, in its discretion, may allow the remission and enter judgment accordingly." In *Southern Pac. Co. v. Fitchett*, 9 Ariz. 128, 80 Pac. 359, the verdict was for \$1,000 for "injuries to feelings," from which the plaintiff, upon the suggestion of the trial court, remitted \$600. This court held that it was apparent that the jury was influenced by passion or prejudice, and that therefore a new trial should have been granted. We further sought to distinguish the facts in that case from the *Tomlinson Case* [*So. Pac. Co. v. Tomlinson*, 4 Ariz. 126, 33 Pac. 710], suggesting that in the latter the damages were susceptible of accurate computation from the evidence. We are not now prepared to adhere to the views so expressed. Both are cases of unliquidated damages. In the one case no less than the other, the jury's verdict represents the damages "proportioned to the injuries resulting" in the opinion of the jury, based upon evidence that affords no basis for exact computation. If there is a difference, it is one of degree rather than one of kind. There is authority for the position that in no case of unliquidated damages should the court permit a remission where the verdict is excessive, without the consent of the defendant, but as we now view it, the great weight of authority supports the practice. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Arkansas Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854; *Kennon v. Gilmer*, 131 U. S. 22, 4 Am. Neg. Cas. 823, 9 Supt. Ct. 696, 33 L. Ed. 110; 29 Cyc. 1022, 1023, and cases cited.

It is argued that to permit a remittitur, or to require it as a condition of refusing a new trial, is to substitute the court's judgment for that of a jury, to the latter of which the defendant is entitled. But it is to the jury's judgment that defendants object when they appeal to the court for new trials on the ground of excessive verdicts. The trial court has undoubted power to determine whether the verdict is or is not excessive, and in considering the question usually determines in its own mind the maximum amount for which a verdict could with

propriety be permitted to stand. Where there has been error of law committed which would require a retrial, and it appears that the excessive verdict has resulted from too liberal views as to the damages sustained, rather than from prejudice or passion, to permit a remission of the excess, instead of putting the parties to the expense of new trial, promotes justice and puts an end to the litigation. Of course, if it appears that the verdict is tainted by prejudice or passion, and does not represent the dispassionate judgment of the jury upon the question of the right of the plaintiff to recover, a new trial should be granted. But we think that the trial court is in a better position to determine whether the verdict is so tainted than is this court, and that unless it clearly appears from the record that the excessive verdict resulted from prejudice or passion, rather than from that liberality which jurors sometimes exercise in cases which appeal to men's sympathies, we should accept the trial court's determination. The trial court in this case has determined that the jury was not influenced by passion or prejudice, and we see no reason for not accepting its conclusion.

Other rulings of the court are assigned as error and have received our consideration, but they are not of sufficient importance to warrant discussion here. We find no reversible error in the record, and affirm the judgment of the District Court.

KENT, C. J., and LEWIS and DOE, JJ., concur.

DOAN, A. J., (specially concurring). I concur in the result arrived at in this case, but not in the analysis given of the opinion of this court in the Fitchett Case [So. Pac. Co. v. Fitchett, 9 Ariz. 128, 80 Pac. 359]. This court held in the Tomlinson Case [So. Pac. Co. v. Tomlinson, 4 Ariz. 126, 33 Pac. 710], that a trial court has the power to make a remission of excessive damages a condition precedent to denying a new trial, but said: "If it is apparent to the trial court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside * * *. When the circumstances, as they may appear to the trial court, indicate that the jury deliberately disregarded the instructions of the court, or the facts of the case, a remittitur should not be allowed, but a new trial should be granted. If they do not so indicate, and the plaintiff voluntarily remits so much of the damages as may appear to be excessive, the court, in its discretion, may allow the remission and enter judgment accordingly." In the Fitchett Case, *supra*, this court held that it was apparent that the jury was influenced by passion or

prejudice, and that, therefore, a new trial should have been granted.

The trial court in the case now under consideration has determined that the jury was not influenced by passion or prejudice; the record discloses no reason for refusing to accept its conclusion; the affirmance of the judgment of the lower court is, therefore, in perfect harmony with the former rulings of this court in both the Tomlinson and Fitchett cases, *supra*.

ALLEN V. KNIGHT'S ISLAND CONSOLIDATED COPPER CO.

[U. S. CIRCUIT COURT OF APPEALS, DISTRICT OF ALASKA, DECEMBER, 1909.]

3 Alaska, 651.

1. Master and Servant—Fellow Servant—Competency.

The fact that a fellow servant failed, when called upon, to blow out a candle, the flame of which caused an explosion of gasoline, causing injury to plaintiff who was busy in fixing certain pipes under gasoline tanks on a launch and whose hands were necessarily engaged in holding a wrench upon a nut, does not show the former to have been so unsafe or incompetent an employee as to render the master liable.

2. Master and Servant—Assumption of Risk—Conduct of Fellow Servant.

The failure of a fellow servant to extinguish, upon request, a candle, the flame of which caused an explosion of gasoline, is a risk assumed by one employed as engineer of a gasoline launch, who, at the time of the injury, was engaged in fixing certain pipes under the gasoline tanks so that he was unable to extinguish the flame himself.

Demurrer to a complaint filed by defendant in an action brought to recover damages for personal injuries to plaintiff, alleged to have been caused by the negligent explosion of a gasoline tank upon a launch. Demurrer sustained.

For plaintiff—Brown & Lyons.

For defendant—Ostrander, Donohoe & Murray.

STATEMENT OF FACTS: The defendant is a corporation organized under the laws of the State of Washington, and doing business in the Territory of Alaska, *i. e.*, mining at Drier Bay, Knight's Island. On the 20th day of April, 1909, one William Jane was employed, and was at the time acting, as the agent and superintendent of the defendant company at Drier Bay, on which date the said Jane hired and employed the plaintiff to act as engineer of the gasoline launch Union, used by the defendant company in and about its work on Drier Bay.

NOTE.

On the general subject of Liability for Acts of Fellow Servant, see notes in 6 Am. Neg. Rep. 297; 7 Am. Neg. Rep. 188.

And on the same subject see Vols. 13-16 Am. Neg. Cas. where the "Master

and Servant Cases" in the several States and Territories and the Federal and Supreme Courts of the United States, with numerous notes of English cases, from the earliest period to 1896, are reported and classified and arranged in alphabetical order of States.

On said 20th day of April, 1909, while acting as said engineer on the launch, the plaintiff was fixing certain pipes under the gasoline tanks in the bow of said launch, and was using a lighted candle, which it was necessary for him to have in order to fix said pipes, which pipes were out of order and needed repairing and fixing. At a certain point in said work, as a matter of safety, the plaintiff, who had both hands necessarily engaged and occupied holding a wrench fastened upon a nut in each hand, and who was for said reasons unable to put out the said candle, kicked the same out from under said tanks where he was working, and at the same time called in a loud tone of voice to said Jane to blow out said candle, as it was dangerous to allow it to continue burning. At the time Jane was within a few feet of plaintiff, and heard plaintiff tell him to blow out the said candle; but said Jane carelessly and negligently refused to blow out the said candle, and setting it, still lighted, at some point in the bow of said launch, caused an explosion of the fumes of the gasoline, whereby plaintiff was severely burned about the face, arms, and body.

Further plaintiff alleges that he was without fault in said matter; that he was engaged in said work of repair, and was unable to see the said candle, and did not know that it was still lighted, and relied upon the said Jane to extinguish the same; that said injuries to plaintiff were caused by the carelessness and negligence of the defendant, by and through its superintendent and duly authorized agent, and not otherwise; that the said superintendent, Jane, stood in the relation of vice principal towards plaintiff in said employment, and said superintendent, Jane, was fully authorized to look after and care for all of the property of said defendant at said Drier Bay, and to have fixed and repaired the said gasoline launch, to run and operate it, and to employ an engineer or engineers and to hire and discharge help; and that said injuries were caused to happen by and through the negligence and carelessness of said defendant, by and through its said agent and superintendent, while he and plaintiff were both acting in the usual, ordinary, and necessary scope and course of their employment by the defendant. Plaintiff demands judgment against the defendant in the sum of \$10,164, and for his costs and disbursements. To this complaint, the defendant filed its demurrer.

OVERFIELD, DISTRICT JUDGE, (after stating the foregoing facts). Considering the facts set out at length in this complaint in their most enlightened and favorable point of view, we find the plaintiff and Jane fellow servants, engaged in a common undertaking, on the 20th day of April, 1909. While so engaged in the common under-

taking of repairing pipes below a gasoline tank on the launch, the plaintiff, in the usual, ordinary and necessary scope of his employment, used a lighted, open candle, which he evidently had setting at some convenient reach, at least of his feet, and for some reason desired to remove it. To do so he deliberately kicked the same out from under the tank, calling upon Jane, in a loud tone of voice, to extinguish the same. The reason assigned by the plaintiff for not himself handing the candle to Jane or blowing it out was that his hands were engaged in holding a wrench on a nut. The plaintiff at that time knew the danger of continuing work with the candle lighted, and he so notified Jane.

The plaintiff would then invoke an alleged rule of law, which, upon the facts set out, would hold the defendant company in damages for the resultant injury, on the principle that the injury resulted from the negligence of Jane, and that Jane stands in the relation of vice-principal to defendant. The case presents for careful consideration the application of what may be said to be well-settled rules of law to the facts conceded by the demurrer and as alleged in the complaint.

The difficulty consists in the application to the particular facts of each case of the rules of the law of fellow servants and master and servant, now well defined by the courts. I do not consider it necessary to revert in detail or at length to the history of the law of fellow servants as it was announced in the case of *Murray v. South Carolina R. Co.*, 1 McMul. (S. C.) 385, 36 Am. Dec. 268 [1841], in the United States, and in the case of *Hutchinson v. York N. & B. Ry. Co.*, 5 Exch. Rep. 343, 13 Am. Neg. Cas. 608, in England, nor to the modification of the law of fellow servants since the decision of the Supreme Court of the United States in the case of *Chicago, M. & St. P. Ry. Co. v. Ross*, 112 U. S. 383, 5 Sup. Ct. 184, 28 L. Ed. 787, 17 Am. & Eng. R. Cas. 501, as announced by Mr. Justice Field in 1884. It is sufficient, I apprehend, to state what is the law now, and apply to it the facts of the case now under consideration.

Without quoting the United States Supreme Court decisions leading up to and embodying the present law of fellow servant, they may be said to have clearly reached the following conclusions, which control this court: That the following duties devolve upon the master with respect to his servants and employees: (1) To provide a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged; (2) reasonably safe tools, appliances and machinery for the accomplishment of the work necessary to be done; (3) to exercise proper diligence in the employment of reasonably safe and competent men to perform their re-

spective duties; (4) the adoption and enforcement of proper rules for the conduct of the business. If the master be neglectful in any of these matters, and an employee suffer damages, the master is liable.

Reverting again to the facts of the case, do we find the defendant company derelict in any of the duties hereinabove enunciated, either in providing the proper tools and machinery or in the selection of its employees? It is apparent that no fault existed as to the provision of tools by the defendant company for the use of the plaintiff and Jane. Nor is there an allegation of the incompetency of the agent or coemployee, Jane, except that in the one particular he refused or failed, upon the order or request of plaintiff, to blow out the candle kicked from under the gasoline tank by plaintiff. Can we, on these existing facts, hold that the defendant company failed in one of its positive duties to provide reasonably safe and competent men to perform their respective duties? If so, the demurrer must be overruled.

The plaintiff was employed as an engineer, and with Jane working at the time as a co-laborer. It is reasonable to assume that the plaintiff was particularly qualified to know, and did know, the risks of his employment, and especially in the hazardous work of attempting to repair pipes under a gasoline tank on a launch by the aid of a light produced by candle. That the plaintiff did anticipate all the dangers to be encountered up to the time he removed the lighted candle by kicking it away is effectually stated in his complaint, when he alleges that both he and Jane were acting in the usual, ordinary, and necessary course and scope of their employment.

Passing for the moment the consideration of any delict of the plaintiff which might constitute contributory negligence, the point then remains for final decision of the case whether the act of Jane in failing or refusing to extinguish the candle kicked from under the gasoline tank was the negligence of Jane in a duty obligated on the defendant company. Jane admittedly was acting in conjunction with the plaintiff in the work, for the time being, just as any fellow servant would, although he was an agent of the defendant, empowered to hire and discharge the plaintiff. Everything was provided for the work in the usual and ordinary way, as to the place to work, appliances and laborers. We must assume Jane to have been a reasonably safe and competent man to perform the work they were engaged in, in the absence of anything to the contrary appearing in either showing knowledge on the part of the defendant company of the incompetency of Jane or reasonable cause why the company should have known of his inability or failure to fill the position assigned him by his company. Such allegations or facts do not appear in this matter. It

therefore follows that the defendant failed not in any of the duties devolving upon the master. Jane's delict, if such it was, can be attributed only to him as a fellow servant, a delict the company could have in no way anticipated or provided against. The plaintiff must necessarily have assumed by reason of his employment, the very thing done by Jane. It is one of the weaknesses of human nature which no corporation or body can control or prevent.

The decisions have placed the responsibility for the negligence or co-laborers upon themselves, after having held the master accountable, in the wisdom of years of experience and observation, for the positive duties hereinbefore outlined. This decision has been reached upon the assumption that the plaintiff was in no way guilty of contributory negligence, an assumption which the facts of the case, by even a casual reading, will not authorize, and a discussion of which is not necessary to the decision herein reached.

Demurrer sustained.

WALTERS v. AMERICAN BRIDGE COMPANY.

[SUPREME COURT OF PENNSYLVANIA, JANUARY 2, 1912.]

— Pa. —, 82 Atl. 1103.

1. Appeal—Curing Error—Judgment Non Obstante Verdicto.

The direction of a judgment for the defendant *non obstante verdicto* cures the erroneous submission to the jury of a question raised by a defense which is sustained by undisputed evidence, whereby the jury are afforded an opportunity to return a verdict against the defendant.

2. Negligence—Repairing Bridge—Question for Jury—Independent Contractor.

In an action for personal injuries sustained by one while crossing a bridge undergoing repair, a defense that the work was being done by an independent contractor raises no question for the jury, where the evidence sustaining it is not improbable nor at variance with any proof or admitted facts or with ordinary experience.

3. Negligence—Repairing Bridge—Independent Contractor.

A company subletting a contract with a county, for the repair of a bridge, to an independent contractor, who has entire charge of the work, is not liable for injuries from the latter's negligence, sustained by one while crossing the bridge.

4. Contract—Subletting—Negligence.

A stipulation in an agreement between a county and a bridge company, for the repair of a bridge, that the contract shall not be sublet, cannot be taken advantage of in a suit against the company, by one injured while crossing the bridge by the negligence of an independent contractor performing the work.

5. Judgment—New Trial—Discharge of Rule.

A discharge of a pending rule for a new trial is a prerequisite to the entry of judgment.

Appeal by plaintiff, John T. Walters, from a judgment of the Court of Common Pleas of Allegheny County, rendered in favor of defendant *non obstante verdicto*, in an action brought to recover damages for personal injuries. Affirmed.

For appellant—Frederic W. Miller and John S. Robb, Jr.

For appellee—David A. Reed.

NOTE.

On the subject of Injuries to Persons from Defective Bridges, see notes in 11 Am. Neg. Rep. 128; 15 Am. Neg. Rep. 178,

And on the subject of Work Done by Independent Contractor as Relieving Employer, see note in 16 Am. Neg. Rep. 599.

BROWN, J. The accident which resulted in the injury to the plaintiff below was a peculiar one. He was crossing a county bridge over Chartiers creek, in the borough of Carnegie, about 11 o'clock at night on October 8, 1904, when he saw a street railway car coming towards him on one of the two tracks upon the bridge. He was on the track upon which the car was approaching and stepped over onto the other track when he heard a car coming behind him. He thereupon stepped up from the track onto a water main which was upon the cartway of the bridge, and, to steady himself while in that position, placed his hand upon a latticed railing, which, for some time, had been in an upright position between two beams; the bottom of it resting upon the ends of boards which constituted a part of a sidewalk on the bridge. Some time before the accident the county of Allegheny had entered into a contract with the American Bridge Company, the appellee, for the reconstruction of this sidewalk, and the old boards constituting the same had been removed, leaving the latticed railing to rest practically in equilibrio on an iron crossbeam or girder. It had thus rested for several days, and, when the plaintiff below placed his hand upon it to steady himself, the one end tilted up, and his hand was caught between one of the upright beams and the railing as it slipped into the creek below, resulting in the injuries for which he seeks damages in this action. The defense was threefold: (1), no negligence was shown which was the cause of plaintiff's injury; (2), he was guilty of contributory negligence; and, (3), the work of repair at the bridge was being done by an independent contractor. The case went to the jury under instructions that each of the questions raised by the defense was for them, and a verdict was returned for the plaintiff. Subsequently a motion for judgment for the defendant *non obstante verdicto* was sustained, for the reason that, under the undisputed evidence in the case, the work was being done by an independent contractor at the time the plaintiff was injured, and he was therefore not entitled to recover from the appellee. The court at the same time intimated a doubt as to whether any negligence had been shown which caused the injuries sustained.

The contract with the appellee for the reconstruction of the sidewalks on the bridge was in writing, but at the time it was executed the appellee was under a written contract or agreement with a partnership known as the Nelson & Buchanan Company, by the terms of which that partnership or firm was to do all bridge work within a specified territory, including the borough of Carnegie. The execution of this agreement was admitted on the trial. On June 23, 1904—seven days after the appellee had made its contract with the county of Alle-

gheny—it notified the Nelson & Buchanan Company in writing that, though it had taken the contract in its own name at the request of A. H. Nelson, one of the firm, its interest in the work to be done was limited to the furnishing of the steel material required, and requested the firm to send a formal order for the sidewalk brackets. On June 27, 1904—four days later—the Nelson & Buchanan Company, recognizing the existence of the contract between it and the American Bridge Company, wrote that company and inclosed, as requested, an order for the sidewalk brackets. There was thus before the court unmistakable written evidence that the Nelson & Buchanan Company had assumed to do all the work in connection with the reconstruction of the sidewalks on the bridge; and that it actually did the work as an independent contractor was clearly established by the testimony of A. H. Nelson and J. J. Acklin; the latter being foreman of the Nelson & Buchanan Company. These were two entirely disinterested witnesses, and the jury could have had no reason for doubting their candor or questioning their credibility. They testified positively that the work was done by the Nelson & Buchanan Company; that no work was done by the American Bridge Company; that it did not have any men on the work, and took no part in the same. Under the uncontradicted written evidence and the unimpeached parol testimony of disinterested witnesses, there was no question that the work on the bridge was being done by an independent contractor at the time the appellant was injured, and the learned and careful trial judge in his opinion directing judgment for the defendant *n. o. v.* corrected the error into which he had temporarily fallen in giving the jury an opportunity to return a verdict against the defendant.

It is vain for the learned counsel for appellant to insist that, under the rule as to parol testimony, the case was one for the jury, and the plaintiff is therefore entitled to judgment on the verdict. There was no evidence that any employee of the defendant company was ever on or about the bridge or had ever done any act in connection with the work of repair; while, on the other hand, the oral testimony on the part of the defendant as to the independent contractor was not in itself improbable, was not at variance with any proof or admitted facts or with ordinary experience, and, having come from witnesses whose candor there was no ground for doubting, the jury ought not to have been permitted to indulge in a capricious disbelief of their testimony. *Lonzer v. Lehigh Valley R. Co.*, 196 Pa. 610, 8 Am. Neg. Rep. 335, 46 Atl. 937. All that was established by the oral testimony in the case was that a subcontract, contemplated by a written agree-

ment between the appellee and the Nelson & Buchanan Company, and assumed in writing by that firm, was performed by it.

Nothing urged by counsel for appellant can take this case out of the rule as to the liability of an independent contractor for injuries resulting from his negligence in performing his contract. Contracts for public works are within the rule. *Painter v. Pittsburgh*, 46 Pa. 213; *Erie v. Caulkins*, 85 Pa. 247, 27 Am. Rep. 642; *Susquehanna Boro. v. Simmons*, 112 Pa. 384, 5 Atl. 434. Some stress is laid upon the clause in the contract between the appellee and the county of Allegheny that it was not to be sublet, but of this the appellant can take no advantage. If he had a cause of action against any one, it was against the party whose negligence caused it, and not against another, having had, as a matter of fact, nothing at all to do with the prosecution of the work at the time of the accident.

In directing judgment to be entered for the defendant *n. o. v.* the court below failed to dispose of the rule for a new trial. This is not a proper practice. When we called attention to it on the argument of this appeal, the statement was made that the court below had probably followed *Dalmas v. Kemble*, 215 Pa. 410, 64 Atl. 559. Nothing said in the concluding words of that opinion justifies the holding of a rule for a new trial when a court below undertakes to enter judgment on the verdict or for the plaintiff or defendant *n. o. v.* No case is ripe for judgment with a rule for a new trial undisposed of. The present case well illustrates this. If we should reverse the judgment and direct judgment to be entered for the plaintiff on the verdict, our reversal could be set at naught upon the return of the record, if the rule for a new trial, still *sub judice*, should be made absolute. Hereafter, when it appears that a rule for a new trial has not been disposed of by the trial court, the record will be remitted, for a discharge of a pending rule for a new trial is a prerequisite to the entry of judgment. We affirm this judgment on the assumption that the learned court below will discharge the rule as of the date it directed the judgment to be entered.

Judgment affirmed.

MOSCHZISKER, J., (concurring). Under the evidence in this case I would not affirm on the theory that the defense of independent contractor was a matter of law for the court; I would, however, on the ground that no negligence was proved. The defendant company could not reasonably have anticipated the happening of the events which resulted in the plaintiff's injury, for the railing which gave way was never intended for the use to which he put it.

THIBODEAU v. CHEFF.

[COURT OF APPEAL, ONTARIO, CANADA, JUNE 15, 1911.]

24 Ont. L. Rep. 214.

1. Parent and Child—Torts of Child.

A parent may be liable for the torts of a minor child committed with his knowledge and acquiescence.

2. Parent and Child—Fires Set by Imbecile Child—Knowledge of Propensity—Liability.

In an action against a father to recover damages caused by the destruction of property by a fire set by his child, a finding in favor of the plaintiff is sustained by evidence that the child who set the fire was an imbecile boy, about sixteen years of age, that by reason of the weakness of his intellect he was unable to understand the difference between right and wrong, that it was dangerous for the father, in whose custody the child lived, to permit him to be at large without being watched by reason of his habit of smoking and his frequent use of matches to kindle small fires, and that the father knew of his character and habits, and of the fact that he had previously set fires.

Appeal by defendant from a judgment based upon the verdict of a jury in an action brought to recover damages for the destruction of property by fire set by the imbecile child of defendant. Affirmed.

For plaintiff—O. L. Lewis, K. C., and W. G. Richards.

For defendant—Matthew Wilson, K. C., and J. M. Pike, K. C.

STATEMENT OF FACTS: The following facts appear from the opinion of the trial court: The plaintiff is a farmer residing in the county of Kent, occupying a farm belonging to the defendant, who is a merchant residing near to the plaintiff. The plaintiff's crop of fall wheat for the season of 1910 was harvested and threshed, cleaned up and stored in a granary near to the defendant's store. The straw was stacked near by. According to the plaintiff's evidence, he said to the defendant, on the day when the plaintiff had completed storing the wheat, that he, the plaintiff, had a nice crop of wheat and he did not want the defendant's children around there. On the 20th of August, 1910, between five and six o'clock in the afternoon, the straw stack was set on fire, and the straw and granary and wheat were destroyed.

NOTE.

On the subject of Liability of Father for Torts of Son, see note in 6 Am. Neg. Rep. 413.

The plaintiff alleged, and the jury have found that to be so, that the fire was set by an irresponsible imbecile son of the defendant. This boy did not fully appreciate the difference between right and wrong—he was under age, lived with his parents, and was housed and fed and clothed and cared for to a certain extent by the defendant. The plaintiff further alleged that this boy had, to the knowledge of the defendant, an inclination and propensity to handle lighted matches and to set out fire in places and under circumstances where fire would be likely to do damage. The defendant is charged with negligence by reason of which this boy was permitted to set the fire of which the plaintiff complains. The court (BRITTON, J.), submitted to the jury certain questions, now attached to the record, all of which were answered by the jury.

BOYD, J. For injuries committed by an infant in the course of his employment as a servant by his father, the latter is responsible, as in other cases of master and servant. But the rule of common law is that a parent is not, because of his family relationship, legally responsible to answer in damage for the torts of his infant child. Upon this rule exceptions are engrafted, that where the father has a knowledge of the wrong-doing and consents to it, where he directs it, where he sanctions it, where he ratifies it, or participates in the fruits of it, he becomes in effect a party to it, and as such is liable to the injured person. That is the result of the American decisions upon which Mr. Schouler frames the statement of the law adopted by the Ontario Court of Appeal in *File v. Unger*, 27 A. R. 468, 472.

A subsequent American author puts the same conclusion more briefly thus: "A parent may be liable for his child's torts committed with his knowledge and acquiescence:" *Tiffany on Domestic Relations*, p. 239, sec. 120 (1896).

In the case under consideration the father did not see the act done and consent to it. Nor did he direct the doing of it, nor did he share in any benefit; on the contrary, he shared in the destruction caused by it; so that the precise question is—did he so acquiesce with knowledge that he has made himself accountable to the plaintiff?

The correct doctrine as to liability in the present case is, in my opinion, stated in the article on Parent and Child in 29 *Cyc.* p. 1666, thus: "While a parent may be liable for an injury which is directly caused by the child, where the parent's negligence has made it possible for the child to cause the injury complained of and probable that the child would so do, this liability is based upon the rules of negligence rather than the relation of parent and child." (1908).

I find that this passage is quoted and accepted as a valid statement of law by the court of Errors and Appeals in New Jersey, in November, 1908, by Voorhees, J., speaking for the Court, in *Doran v. Thomesen*, 76 N. J. L. (47 Vr.) 754, 760.

No objection was made to the frame of the questions as submitted for consideration. There was an objection made to the reception of evidence as to acts of the boy not brought home to the knowledge of the father; but these were not irrelevant, with a view of showing the propensity of the boy to strike matches for the purpose of lighting fires. Lucifer matches *per se* are, of course, not dangerous things, but they are very obvious sources of danger when ignited by foolish and reckless hands. The defendant was told by the plaintiff, a week or so before the fire, that the plaintiff had a good crop in the granary, and he did not wish it destroyed, and he asked the defendant to look after his children.

The evidence was, as usual, contradictory, but there was testimony for the jury on these points: The boy was in the habit of carrying round and using matches and tobacco; he was in the habit of playing with a wheelbarrow and running it round as a traction engine in the barn-yard and by the straw stack; he started little fires with matches and straw beside buildings on two occasions: one under the kitchen in Bellville's place "to make steam," in May, 1908 (not reported to the defendant), and one on Bourgeon's place, next neighbor to the defendant, in the summer of 1909, a year before the fire in question, which Bernier told the father about—though the father denies it.

At Emery's place in July, 1910, the boy was twice stopped on the same day as he was about to light a match in the straw (not reported to the father).

And the father admitted to Bellville that his store was once nearly burned by the boy (this is contradicted).

The salient facts have all been found by the jury, and, although objection was made to some points in the charge of the learned trial judge, yet as a whole he placed the matters to be determined fully and fairly before the jury. They have found that the fire which destroyed the stack and the granary of the plaintiff was caused by Rollin Cheff, the infant son of the defendant. They have found that this boy, by reason of the weakness of his intellect, his want of intelligence, and of not understanding the difference between right and wrong, and by reason of his being addicted to the habit of smoking and the frequent use of matches, was a dangerous person to be at large without being under surveillance or being watched by some person of ordinary discretion to prevent his setting out fires. They also find that the father

(in whose house he lived and under whose custody he was) knew of the character and habits of Rollin and of the danger from fire of his being at large alone.

The jury find that the father was guilty of negligence in the premises, by reason of his not taking any steps to control or restrain the boy in carrying and lighting matches and in setting out fires, after the defendant had been told of these actions by his neighbors.

They also find (though this would be rather for the court than the jury) that the probable result of the lack of necessary precaution in the custody of the son was to enable the son to destroy property.

There seems no doubt that the son, though sixteen years of age, was stunted and undeveloped in body and mind—he busied himself with matches and smoking and kindling fires in getting up steam, as he played with a wheelbarrow, which he regarded as a traction engine. He was a congenital idiot of irresponsible impulses, whose fitting place was where he now is, under treatment in the asylum at Orillia. The unfortunate father had this inmate of his house, and unless vigilant supervision of the son's movements was exercised, deplorable results might be expected.

The usual rule as to dangerous articles appears to be pertinent to this situation. Any one possessed of a dangerous instrument owes a duty to the public, or to such members of the public as are reasonably likely to be injured by its misuse, to keep it with reasonable care, so that it shall not be misused to the injury of others: *Palles, C. B.*, in *Sullivan v. Creed*, 2 I. R. 317, 329 (1904). And in *Palm v. Iverson*, 117 Ill. App. 535 (1905), it is held that a person who negligently authorizes the use by another person of a dangerous article under such circumstances that he has reason to know that it is likely to produce injury, is liable for the natural and probable consequences of his acts to one injured who is not himself at fault; and further, in the same case, "that in order to render a parent liable for the tort of his infant son, it is essential that it should appear from the evidence that he might reasonably have anticipated injury as a consequence of permitting such son to employ the agency which produced the injury."

The American authorities (and I find no English ones on the precise point) indicate that the father's sanction (that is, his knowledge and acquiescence) may be proved by evidence of circumstances leading reasonably and fairly to the conclusion, though there be no proof of direct and express sanction. It is stated in 29 Cyc. 1665, that the father is not liable for torts committed without his authority, expressed or implied; and in *Beady v. Reding*, 16 Me. 362 (1839), the Court says that the maxim that where a man has the power of prohibiting the

doing of a thing, his omission to exercise that power is an evidence of his assent, is one which may be applied with great propriety to minor children residing with and under the control of their father. I take it, then, that the proof of the father's assent or consent may be express or implied, and that, when a father carelessly and negligently countenances his child in having and using the dangerous agency which may be expected to do harm, he is liable without direct proof of his actual knowledge of the particular act of tort, so long as the circumstances of the case reasonably satisfy the Court or the jury of the father's responsibility.

It may be safely laid down that the father is liable for the conduct of his young child, if he knows of the child's frequent wrongdoing in a particular direction, and, by his inaction or his attitude (when he is able to restrain or confine the child), he indicates his willingness that the misconduct should be repeated. This appears to be so *a fortiori* when the child is of imbecile or demented mind, incapable of distinguishing right from wrong, and one whose manner and habit of intermeddling with dangerous things easily obtained or to which there is easy access, is likely to or even may probably bring about destructive results to the property of others.

A case is noted in 10 L. R. A. (N. S.) at pp. 935, 936 (1907), in an Ohio Court, which I cannot find in the library, in which the jury were instructed that the defendant would not be liable for the tort of his seven-year-old demented son unless he knew the boy was demented and dangerous, and knowingly permitted him to be at large without proper surveillance: *Cluther v. Svendsen*, Cin. Sup. Ct., 9 Ohio Dec. Reprint 458; see *Johnson v. Glidden*, 11 So. Dak. 237, 5 Am. Neg. Rep. 97, 74 Am. St. Rep. 795 (1898); and *Meers v. McDowell*, 110 Ky. 926, 96 Am. St. Rep. 475 (1901).

We find here this cumulation of circumstances constituting the elements of the defendant's liability: (1) the tortious act of the child and his irresponsible character; (2) the boy's easy access to matches, which he was in the habit of handling and playing with and igniting; (3) the knowledge by the father of his child's incapacity and his manner of acting and playing; (4) the likelihood of danger arising to property from setting out fires by the boy and the complaints made by the neighbors on this score; (5) the failure of the father to take steps to avert disaster by removing effectively the articles producing danger or by corporal restraint of the child.

These things being established, I cannot doubt that the verdict and judgment is well founded and should not be disturbed.

The appeal will be dismissed with costs.

MARCOTT v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO.

[SUPREME COURT OF WISCONSIN, OCTOBER 24, 1911.]

147 Wis. 216.

1. Carriers—Personal Injuries—Insufficient Heating of Car.

A carrier is not liable to a passenger who sustains injury to his health on account of the insufficient heating of the coach in which he was riding, in absence of proof that the carrier had reason to foresee that a dangerous condition would exist in the coach and to anticipate injury to any healthy person by reason of the atmospheric conditions therein.

2. Carriers—Injury to Passenger by Insufficiency of Heat—Evidence.

In an action brought against a carrier to recover damages for personal injuries sustained by a passenger on account of the insufficient heating of a sleeping car, evidence held to be insufficient to show that the passenger contracted pneumonia on account of insufficient heat as alleged.

Appeal by plaintiff, Simeon E. Marcott, from a judgment of the Circuit Court of Marinette County, rendered in favor of defendant railway company in an action brought to recover damages for personal injuries alleged to be due to insufficient heating of a sleeping car. Affirmed.

CASE NOTE.

Liability of Carrier for Injury to or Death of Passenger Due to Failure to Heat Car or Waiting Room.

- I. GENERAL DUTY OF CARRIER, 383-386.
- II. DANGER OF INJURY AS CHARGEABLE TO CARRIER, 386-388.
- III. INSTANCES OF LIABILITY, 388-392.
 - A. FAILURE TO HEAT CAR, 388.
 - B. FAILURE TO HEAT WAITING ROOM, 390.
- IV. LIABILITY TO POSTAL CLERK OR AGENT, 392-393.
- V. PROXIMATE CAUSE OF INJURY OR DEATH, 393-395.
- VI. CONTRIBUTORY NEGLIGENCE OF PASSENGER, 395-397.

I. General Duty of Carrier.

Railroad companies are not insurers of the safety and comfort of their pas-

sengers, but they are required to exercise the same degree of care in providing for the comfort of passengers that very cautious and prudent persons would exercise under the same circumstances. *Missouri, K. & T. R. Co. v. Byrd*, 40 Tex. Civ. App. 315 (1905).

The duty devolves upon carriers to protect their passengers from cold by the use of such means as would be used by the utmost care that would be exercised by very prudent persons. *Missouri, K. & T. R. Co. v. Byrd*, *supra*; *Hutchinson on Carriers*, § 922.

It is the duty of a railroad company properly and comfortably to warm its coaches for the benefit and comfort of its passengers, especially when such passengers are women and little children, and their discomfort and danger of impairment of health are made

For appellant—Martin, Martin & Martin.

For respondent—H. O. Fairchild, (Alfred H. Bright, of counsel).

STATEMENT OF FACTS: The complaint alleges, in substance, that on the 12th day of May, 1906, plaintiff was at the city of Minneapolis, Minn., and, being desirous of returning to his then home in Escanaba, Mich., he purchased of defendant a passenger ticket, good for transportation over defendant's line of road between said points, and he also purchased of the defendant a sleeping car ticket entitling him to a berth in a sleeping car then operated by it between Minneapolis and Escanaba; that he boarded defendant's train about 6:30

known to the employees of the train and heat demanded. *Fort Worth & D. C. R. Co. v. Hyatt*, 12 Tex. Civ. App. 435, 10 Am. Neg. Cas. 299 (1896). The company was held liable in this case for damages for the death of a young child due to its negligent failure to keep the coaches warm, in consequence of which the child, who was in the care of its mother, contracted a severe cold which caused death.

Carriers are under a common law duty to keep their passenger stations warm during the time passengers are expected to use them, and will be held liable in damages to a passenger who suffers illness as a direct result of their failure to provide heat. *Texas & P. R. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 10 Am. Neg. Cas. 297 (1895); *International & G. N. R. Co. v. Doolan*, 56 Tex. Civ. App. 503 (1909); *Cincinnati, N. O. & T. P. R. Co. v. Mounts*, 31 Ky. Law Rep. 1162 (1907); *Southern Kansas R. Co. v. Caylor*, (Tex. Civ. App.), 135 S. W. 1087 (1911).

"The common law," said the court in *Lindsey v. Penn. R. Co.*, 26 App. D. C. 125, 3 L. R. A. (N. S.) 218 (1906), "without reinforcement of statute, makes it the duty of common carriers to provide suitable cars for the transportation of ordinary contract passengers, and confers a right of action upon one of these who can show that he has suffered injury through the neg-

ligent failure to heat the cars properly in cold weather."

In speaking of the liability of a railroad company to a woman passenger whose health was impaired by exposure in an unheated station, the court in *Georgia, C. & N. R. Co. v. Brown*, 120 Ga. 380 (1904), said: "A railroad company is bound to exercise extraordinary diligence for the preservation of the lives and persons of its passengers while they are being received upon its trains, or being transported therein, and while being discharged therefrom; but it is bound to exercise only ordinary diligence in the preservation of the lives, health, and persons of passengers who are waiting at stations the arrival of trains, or who are detained at stations as the result of a refusal or failure on the part of the company to stop its train for the reception of such passengers."

In an action against a railroad company by a husband to recover damages on account of the sickness of himself and wife, alleged to have been caused when they were passengers on defendant's excursion train, by reason of being compelled to ride in coaches which were not warmed or provided with water, it is error for the court to refuse an instruction that it was the carrier's duty to exercise such a high degree of foresight and prudence as would have been used by a very

P. M. of that day, and it became and was the duty of the defendant to provide for the comfort and health of the plaintiff while so aboard defendant's said train and more particularly to protect plaintiff against the inclemency of the weather, and to keep its cars and train comfortably heated; that notwithstanding its said duty in this regard, and while its said train on which plaintiff was a passenger was passing through the State of Wisconsin, the defendant wholly neglected and refused to provide and furnish heat to its said train and cars, or to any of the cars of said train, although the wind was blowing so cold, sleet and snow were falling, and the temperature was so low and the weather so inclement as to make it dangerous to the health of plaintiff and other passengers then upon said train, because of said failure to keep

cautious, prudent, and competent person under similar circumstances, and to instruct the jury that the carrier was only required to use reasonable care and prudence to warm its coaches and provide water. *Arrington v. Texas P. R. Co.*, (Tex. Civ. App.), 70 S. W. 551 (1902).

And in an action against a railroad company for damages sustained by plaintiff's wife, in which she testified that the car was unheated and that she become sick in consequence thereof, and in which the evidence introduced by the company showed that the coach in which the passenger was riding was heated by a stove in which the coal was replenished from time to time, that the weather was of unusual severity, and that the illness of the passenger was not the result of the company's want of care, it was not error to give an instruction that if the employees of the carrier exercised the care very prudent persons would have exercised under the same circumstances, the carrier was not liable though the passenger became sick from exposure. *Tyler v. Texas & P. R. Co.*, (Tex. Civ. App.), 79 S. W. 1075 (1904).

In an action by a husband to recover damages for personal injuries to his wife who was carried by the defendant railroad company in a car which was not heated although the

weather was cold, and which was so crowded that the wife was compelled to stand and hold her child, in consequence of which she suffered injury to her health, a charge given by the trial court defining the degree of care which it was the company's duty to use, as "that high degree of care which would have been exercised by very cautious and prudent persons under similar circumstances," was held to be a correct statement of the law. In speaking of the duty of the carrier, the court said: "The degree of care required is fixed by the existence of relation of carrier and passenger, by the character of the danger to which a passenger is exposed, and by the exclusive control by the carrier of the agencies by which the danger can be averted. Where the life and health of a passenger is at stake, the care to be exercised is such as would have been used by very cautious and prudent persons. The assumption of plaintiff (carrier) that when a passenger is compelled to ride in an unwarmed coach in inclement weather, the risk is not great and only his comfort and convenience are involved, is unwarranted. Such exposure may result in sickness causing the physical pain, mental suffering and possibly death. Where such serious consequences are to be apprehended, a high degree of care required by the

its said train and cars properly heated; that because of defendant's said failure in that regard plaintiff, while on board said train, contracted typhoid pneumonia, and reached Escanaba, Mich., so sick and ailing that he was confined to his bed; that defendant's said train was delayed several hours, and plaintiff became and was much distressed, and suffered great pain on the way; that plaintiff has ever since been, and now is, an invalid because of said disease thus contracted; that plaintiff's lungs have become and are seriously and permanently diseased, and plaintiff is, as a result of the disease thus contracted, sick, sore, and permanently disabled; that plaintiff has suffered and still continues to suffer great pain bodily, and mental pain and anguish, and has been wholly disabled and prevented from earning a livelihood,

charge must be exercised. The fact that the means of avoiding the injury are simple and can be easily applied, does not affect the degree of care which should be used, but only renders less difficult the discharge of the duty which the carrier owes to the passenger." *St. Louis S. W. R. Co. v. Campbell*, 30 Tex. Civ. App. 35 (1902).

II. Danger of Injury as Chargeable to Carrier.

A carrier is chargeable with knowledge that exposure to severe cold for a whole night will in all probability injuriously impair the health of a passenger, and is, therefore, liable for injuries sustained in consequence of failure to provide heat. *Green v. Missouri, K. & T. R. Co.*, 121 Mo. App. 720 (1906).

The fact that a person whose health was injured was being carried on a freight train, will not excuse the carrier from liability, where the latter must have known that long exposure to cold would in all probability seriously impair his health. *Green v. Missouri, K. & T. R. Co.*, *supra*. In this case the facts show that the plaintiff, who was a man 66 years of age, took shipment on a cold day in January, with his horse and vehicle, in an unheated freight car, to a point on defendant's line. The agent who sold plaintiff his

ticket informed him that he would reach his destination about five o'clock in the afternoon of the same day, but instead, it was five o'clock the next morning before that point was reached. The car in which plaintiff was riding for the purpose of caring for his horses, was left on the siding all night, and plaintiff was not informed of the reason for the delay, nor did he know how long the delay would last. The night was severely cold and plaintiff suffered keenly as the result of the cold. He stated his reason for not leaving the car and going a short distance to the station which was warm, as follows: "After it got dark, the wind was blowing and the cars were passing every few minutes, and I knew it was certain death to go out, I could not see good, or hear good, and would be run over with the trains and knew I best stay in the car, and I thought every minute the train would start, I expected the man to do what he agreed to do after I had done what I agreed to do." The railroad company pleaded in defense that if the plaintiff got into the car where he remained for any length of time exposed to the cold, his conduct was voluntary and without fault on the part of the defendant; if plaintiff suffered any pain or impairment of health in consequence of such exposure, it was the result of his own

and has been occasioned great expense for medicines and physicians, and is informed and believes that he will have to undergo severe surgical operations to preserve his life and alleviate his sufferings, to his damage in the sum of \$50,000.

The answer contains a general denial and an allegation that as to whether the plaintiff was a passenger on one of defendant's trains at the time alleged defendant has no knowledge sufficient to form a belief, and therefore leaves the plaintiff to his proof in that behalf.

The jury returned the following special verdict:

"(1) Did the plaintiff become ill with pneumonia while a passenger in one of the defendant's sleepers on the night of May 12, 1906? Answer: Yes.

recklessness and negligence. The theory of the defense was that there was no delay since the car, in which plaintiff elected to travel, was moved according to the regular schedule for handling business, and if there was any delay, it did not cause the injury, as the defendant was not required to heat the freight car and the plaintiff could have left the car at any time during the delay. In disposing of the contention of the defendant, the court said that the fact that plaintiff was being carried by a freight train will not excuse defendant from liability for negligence, and that the question of negligence should be decided as if plaintiff had been upon a regular passenger train * * *. "We, however, readily concede that if one, with the consent of the conductor, voluntarily rides in a freight car, he must accept the consequences which naturally follow from such a position, which are not directly influenced or brought about by the negligence of the carrier. Thus, the plaintiff in this case had no right to expect that heat would be provided for him in the car in which he chose to ride. And we do not understand that counsel put his right to recover on such ground, although it was stated in the petition that there was no stove or heat in the car. It may be said that the absence of heat from the car caused

the plaintiff to suffer from the cold. But that fact was known and voluntarily accepted by plaintiff. His complaint, as submitted to the jury, is a negligent delay of more than twelve hours in carrying him a distance of only five or six miles, whereby he was exposed to the cold for such an unnecessary time as caused his suffering and consequent impairment of health. So we further concede that a passenger, in the absence of a binding engagement by the carrier, had no right to expect that he will be carried in as short a time by an ordinary freight train as by a passenger train. But he may expect that there will be no unnecessary and negligent delay in his transportation on a freight train. The question of negligent delay was for the jury to determine and it was properly submitted to them, consistently with what we have written, by the court's instruction wherein they were told to take into consideration the character of the train in determining the question whether there was any negligence * * *. In the circumstances which transpired when plaintiff purchased his ticket and was accepted as a passenger, he had a right to expect that he would be carried over the six miles distant to Boonville with reasonable dispatch, and certainly not to be delayed on the road for more than twelve hours. We re-

"(2) Was said disease contracted while said plaintiff was sleeping in his berth in said car? Answer: Yes.

"(3) If your answer to the second question should be 'Yes,' then answer this: Was said disease caused by the plaintiff, while sleeping, becoming chilled by reason of any cold and damp condition of the atmosphere in this car? Answer: Yes.

"(4) If you should answer the third question 'Yes,' then answer this: Was the condition of said atmosphere such as to render it dangerous for healthy persons to sleep in it protected as passengers were in their berths in said car? Answer: Yes.

"(5) If your answers to the third and fourth questions should be 'Yes,' then answer this: Ought a man of ordinary intelligence and

gard the injury to plaintiff's health as being proximately caused by the defendant's negligence. In the situation in which he was placed at the junction, as described by him in the foregoing quotation from his testimony, the defendant must have known that exposure to the severe cold during all that night would in all probability result injuriously to him and perhaps impair his health. It was not necessary that defendant must have known just what form of injury would likely result to plaintiff, but, if it left him in such situation as that the exposure would probably injure him, and it did in fact so result, a liability was incurred."

III. Instances of Liability.

A. Failure to Heat Car.

A carrier is liable to a woman passenger for injuries sustained by her in consequence of its failure to heat its passenger coach. *Atlantic Coast Line R. Co. v. Powell*, 127 Ga. 805, 9 L. R. A. (N. S.) 769 (1907). The court said: "From the allegations in the petition, it appears that, at the time when petitioner became a passenger of the defendant company, the weather was extremely and bitterly cold. Now if, under those conditions of extreme cold then prevailing, the failure to

supply heat would probably result in severe physical injury, or possibly in death, the duty to heat the car by the employment of some of the means now at the command of railroad companies would fall under the duties involving the safety of passengers. In the discharge of such a duty the company would be bound to use extraordinary diligence. Certainly it would require no research to discover, or argument to show, that, if passengers are put in jeopardy, not only relatively to their safety, but of their very lives, by being kept in a close car for hours, and the temperature of the air in the vehicle is below the freezing point, the company has been guilty of gross negligence in respect to them * * *. But where the cold is such as that, if not mitigated by reasonable means, life itself would be jeopardized, the adoption of such means becomes a duty involving the safety of the passenger. See 2 *Hutchinson Carr.* (3d ed.) § 922. If, under the circumstances last supposed, the railroad company is negligent in failing to supply the car in which passengers are being transported, by failing to heat the same, and the passenger suffers serious physical injuries in consequence thereof, the company is liable in damages to the injured party."

A railroad company is not, as matter

prudence in charge of said car, as the porter was, to have reasonably anticipated that by permitting the atmosphere to become as cold and damp as it was in said car, the health of some healthy person would be injured thereby while sleeping in his or her berth? Answer: No.

"(6) If you should answer the second, third and fourth questions 'Yes,' then answer this: Did the temperature of said car fall below 60 degrees after the plaintiff retired and before he awakened in the chill? Answer: Yes.

"(7) If you should answer the second, third and fourth questions 'Yes,' then answer this: Was the chill in which the plaintiff awoke a pneumonic chill? Answer: Yes.

"(8) If your answer to the second, third, and fourth questions should be 'Yes,' then answer this: At what amount do you assess the plaintiff's damage which resulted directly and proximately from the disease which he contracted while asleep in said car? Answer: \$15,000."

of law, excused from liability for the severe illness of a passenger caused by its failure to heat a car on which he was riding during a cold night, by the fact that there were stoves therein and ample opportunity to supply the required heat, and the employees in charge of the train were requested to provide heat. The court quoted with approval the following statement from *Hutchinson on Carriers*, § 515d: "The duty of the carrier extends, not only to the furnishing of safe vehicles, but also to the supplying them with such accommodations as are reasonably necessary for the welfare and comfort of its passengers. This duty would undoubtedly include the supplying them with seats, if a day car or vehicle; with berths, if a sleeping car; with warmth in cold weather; with lights at night." *Taylor v. Wabash R. Co.*, (Mo.), 38 S. W. 304, 42 L. R. A. 110 (1896).

In *Duck v. St. Louis & S. W. R. Co.* (Tex. Civ. App.), 63 S. W. 891 (1901), it was held that a husband was entitled to recover damages sustained by his wife while a passenger on defendant's train, as a result of the crowded, cold, uncomfortable, and filthy condition of

the cars in which she and her child were compelled to ride, and the disorderly conduct of certain other passengers upon the train.

In *St. Louis S. W. R. Co. v. Duck* (Tex. Civ. App.), 72 S. W. 445 (1903), it appeared that the plaintiff, who was a child about two years of age, was asleep when taken by its parents to the depot of the carrier in a baby buggy, a distance of about two and one half blocks; the weather was cold, but plaintiff was well protected with wraps and warm before being taken into the cars. The carrier was held liable in damages on account of its negligence in failing to keep the car properly heated, in consequence of which the child contracted a severe cold, resulting in a serious disease of the head.

And in *Missouri, K. & T. R. Co. v. Harrison* (Tex. Civ. App.), 77 S. W. 1036 (1903), the court held that a railroad company which had advertised to run an excursion train without change of cars over the lines of connecting carriers, is liable for injuries sustained by passengers in catching cold in a car which, through the negligence of

Upon motions duly made, the court changed the answers to questions 2, 3 and 4 from "Yes" to "No," and awarded judgment upon the verdict so amended in favor of the defendant. Plaintiff appealed.

VINJE, J. The evidence necessarily took a wide range and is quite voluminous. The questions, however, calling for a decision upon appeal, lie within a narrow compass. The first one is: Was plaintiff entitled to judgment upon the verdict returned by the jury? They found that plaintiff contracted pneumonia upon the train by becoming chilled, owing to the cold and damp condition of the atmosphere in the car; that the condition of the atmosphere was such as to render it dangerous for healthy persons to sleep in it, protected as passengers were in their berths. But they further found that a man of ordinary intelligence and prudence, in charge of the car as the porter was, ought not reasonably to have anticipated that such cold and damp condition of the atmosphere would injure the health of a healthy person sleeping in his berth. There is nothing inconsistent in these findings. They

the defendant, was not supplied with proper appliances for heating. This case was reversed, however, in 97 Tex. 611 (1904), on the ground that if a carrier had furnished a car which, with the use of proper care on the part of the connecting carrier, might have been properly heated, it cannot be held liable for negligence of the connecting carrier.

And in *Missouri, K. & T. R. Co. v. Byrd*, 40 Tex. Civ. App. 315 (1905), the carrier was held liable to one whose wife was exposed to severe cold, resulting in permanent injury and disease, because of the negligence of the company in failing to keep its car properly heated.

And in *Dillingham v. Hodges* (Tex. Civ. App.), 26 S. W. 86 (1894), an aged passenger was held entitled to recover damages from a railroad company for injuries sustained by her as the direct consequence of the negligent failure of the carrier to provide a fire in the coach in which she was riding as a passenger.

B. Failure to Heat Waiting Room.

A recovery in favor of a woman pas-

senger for personal injuries alleged to have been caused by the failure of a railroad company to provide her with proper accommodations, was sustained in *Missouri, K. & T. R. Co. v. McCutcheon*, 33 Tex. Civ. App. 557 (1903). The following facts were alleged in plaintiff's petition: "That about the 1st and 15th of October, and the 2d and 20th of November, 1901, and the 8th of January, 1902, appellee, being in Cumby and desiring to go to Sulphur Springs, went to appellant's depot on each of said occasions, the train upon which she desired to take passage being behind time on each of said times from thirty minutes to an hour and a half. That she was compelled to wait at the depot at each of said times; that the waiting room in the depot at Cumby was insufficient to protect passengers waiting therein from the rigors of the weather; that it was built of boards and was open; having cracks between the boards, the windows not closed, and the room not heated so as to protect and make comfortable passengers therein. That because of her being compelled to remain in the waiting room she was exposed to extreme

found that a dangerous condition of the atmosphere did in fact exist, but that defendant had no reason to anticipate or know that it was dangerous. To sustain liability it is not enough to show that defendant permitted a dangerous condition to exist. It must also be shown that it was negligently permitted to exist. If defendant had no reason to anticipate any injury to any healthy person by reason of the atmospheric condition maintained, it was not negligent. *Green v. Ashland Water Co.*, 101 Wis. 258, 5 Am. Neg. Rep. 265, 77 N. W. 722, 43 L. R. A. 117, 70 Am. St. Rep. 911. The verdict returned by the jury, therefore, entitled the defendant to a dismissal of the action upon the merits.

Was the trial court warranted in changing the answers to questions 2, 3, and 4 from "Yes" to "No?" As to question 2, it is sufficient to say that the utmost plaintiff can claim from any testimony in the case, including that of his own medical experts, is that the atmospheric condition in the car was such that it might produce pneumonia. None

cold, and to the rigors of winter, and wherefrom she suffered at the time great discomfort and pain, contracted a severe cold, which proved aggravated and which settled on her womb and ovaries and produced extreme inflammation of said organs, and disease therein, which is incurable, and wherefrom the appellee has continuously suffered, and will continue to suffer as long as she shall live, extreme pain, and from which she is and will continue to be incapacitated from pursuing her business as teacher of music."

The facts in *St. Louis, I. M. & S. R. Co. v. Wilson*, 70 Ark. 136, 91 Am. St. Rep. 74 (1901), show that the plaintiff, who was a colored girl under 18 years of age, went about nine o'clock in the forenoon of a day in December to the depot of the defendant for the purpose of taking a train, where she was compelled to remain about an hour in the unheated waiting room set apart for colored persons, and that in consequence of such exposure her health was impaired. In an action for damages sustained in consequence of such exposure, it was held that an instruction to the jury that the rail-

road company would be liable if a passenger was injured by its failure to keep a fire in the waiting room when required by the weather, was not prejudicial as making the company an insurer against the consequences of failing to provide a fire, where the company interposed the defense that the waiting room was properly heated, and not that some unforeseen circumstance prevented the building of a fire. The court said: "By the exercise of such care as ordinary prudence would suggest for reasonable comfort, it could hardly occur that a waiting room, in midwinter, would be devoid of the means necessary to make it comfortably warm at the times when such rooms are needed to accommodate those intending to become passengers. A failure to provide such means is, therefore, at least *prima facie* evidence of negligence."

In *Texas & P. R. Co. v. Mayes* (Tex. Civ. App.), 15 S. W. 43 (1890), it appeared that the plaintiff, who was a cripple, went to defendant's depot about six o'clock in the afternoon to take a train due to leave in about five minutes, but which did not leave until

of the experts testified that plaintiff's pneumonia was, in their opinion, caused by such condition, or that it was reasonably certain that such condition would probably produce pneumonia. Moreover, the consensus of all the medical testimony, and of common observation and experience, is that it would require more than three or four hours from the first exposure to fully develop a pneumonic chill, such as the plaintiff had when he awoke the second time. The reasons for changing the answer to this question will appear more fully in the discussion relative to questions 3 and 4. These two questions can be treated together.

Plaintiff, at the time of the alleged exposure, was 42 years of age, in good health, and weighed about 150 pounds. He claims that he felt first-rate when he entered the car at Minneapolis; that he noticed nothing unusual about the temperature of the car at the time he entered; that he rode for a while in the smoking compartment with the window open, but was not subjected to any draft, and did not feel uncomfortable. About 9:30 in the evening he retired and went to sleep about 10 o'clock. Later he was awakened by a noise like that of a torpedo, heard the trainmen talk, and knew the engine was cut off. He said the car seemed cold, but he called for no additional cover. On cross-examination, he testified the car was comfortable when he awoke, and later, on direct examination, he testified that he went to sleep almost

9:30, during all of which time he was compelled to remain in the waiting room without a fire, although he had requested a porter and agent of the company to have the waiting room warmed. The court, on appeal, sustained a recovery of \$250 damages caused by being thus exposed to the cold.

The facts in *Texas & P. R. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 10 Am. Neg. Cas. 297 (1895), show that plaintiff's wife, who had purchased a ticket from an agent of the carrier, waited in the depot for several hours for the arrival of a delayed train, during which time the carrier's agent permitted the fire to die out, and neglected and refused to rebuild the same, although she repeatedly asked him to do so, in consequence of which she became chilled and made seriously ill. The waiting room was unprotected because one of the doors could not be

closed on account of being off its hinges. In an action to recover damages for injuries thus sustained, the court held the carrier liable.

Under a Kentucky law (Statutes 1903, section 784), providing that railroad companies shall keep their waiting rooms comfortably warm in cold weather, a carrier is liable for injuries sustained by a woman passenger in consequence of the failure of the carrier to maintain a fire on a cold October evening. *Cincinnati, N. O. & T. R. Co. v. Mounts*, 31 Ky. Law Rep. 1162 (1907).

IV. Liability to Postal Clerk or Agent.

The question as to the obligation of a railroad company, having a contract for the transportation of the mails, to keep the mail cars comfortable, arose in the case of *International & G. N. R. Co. v. Davis*, 17 Tex. Civ. App. 340 (1897), in which the company was

immediately; that he thought he slept about an hour or two, but could not tell just how long; that he then woke up with a chill; that it was the chill that woke him up. He was so cold that he shook, and the car seemed cold to him. He asked the porter for heat, and was told the engine was disconnected, and that no more heat could be given him just then. He had a high fever and a headache. He was conscious that some time later the engine came back and coupled onto the train. He said it seemed to him quite a while afterwards. But the uncontradicted evidence of the trainmen, including the engineer, is that, not to exceed 15 minutes after they arrived at the wreck near Ladysmith, the engine of the passenger train was uncoupled, and it proceeded to assist in removing the wrecked engine; that it was engaged in that work not to exceed 50 minutes (some witnesses place it at from 35 to 40 minutes, and the outside limit of all the testimony is 50 minutes); that the engine was then brought back and attached to the passenger train, and the heat connected as usual.

It may therefore be said to be a verity in the case, that from the time when plaintiff first awoke, as they first approached the wreck, to the time of the pneumonic chill, no more than an interval of from 65 to 70 minutes could have elapsed; and it was during this time, it is claimed that he contracted pneumonia. There is practically an entire absence of evidence to show that the temperature of the car was cold or damp or dangerous to sleeping persons during this night. At Barren 30 miles west of Ladysmith, the maximum temperature on the 12th

held liable to a postal clerk, as to a passenger, for failure to heat the mail car on a cold, damp day, after notice from him that the car was uncomfortable and disagreeable to work in, and in consequence of the company's failure to make the car comfortable he contracted a severe cold and become sick and incurred medical expense.

Likewise, in *Lindsey v. Penn. R. Co.*, 26 App. D. C. 125, 3 L. R. A. (N. S.) 218 (1906), it was held that under a statute which requires railroads having contracts to carry mails to provide cars properly warmed, a route agent is entitled to recover from the company damages sustained by him in consequence of a failure to heat the car carrying mail which he was required to accompany. The court intimated that, independent of statute, the plain-

tiff would have a right of action for injuries resulting directly from such negligent failure to heat the car provided for his transportation.

But, if the mail car is properly heated by the railroad company and the postal clerk carelessly leaves the door open, the company cannot be held liable to him for damages resulting from his becoming seriously ill and losing his power of speech on account of the cold condition of the car. *Turrentine v. Richmond & D. R. Co.*, 92 N. C. 638 (1885).

V. Proximate Cause of Injury or Death.

If the negligence of a carrier in failing to heat a waiting room properly caused the condition of health in a passenger, who was obliged to remain in

was 76 degrees, the minimum 58 degrees. At Prentice, 40 miles east of Ladysmith the maximum temperature on that day was 75 degrees, the minimum 60 degrees. These two places are the nearest to the place of the wreck showing the exact temperature, and it is fair to assume that the temperature at Ladysmith did not differ very materially from that at Barron and Prentice, being in the same latitude and only from 30 to 40 miles distant, west and east, respectively, from these two places. Mrs. Galloway, a passenger upon the sleeper, testified that she was dressed in ordinary spring clothes; that she retired about 10 or half past 10 in the evening, undressed, and put on an ordinary sleeping gown; that before she retired she used no wraps or coats; that she was comfortable, noted nothing abnormal about the temperature of the car; and that after she retired the ordinary covering of the berth was comfortable. Miss Holland, another passenger, corroborates this testimony. There were eight or ten other passengers in the car at the time. The porter of the train testified that the temperature of the car did not fall below 60 degrees; that it was from 60 to 65 degrees. Some of the men working about the wreck testified that it rained before the passenger train arrived at the wreck, but that it did not rain while the train was there. Others said there were occasional light showers during the night. All unite in saying that the night was not a cold one; that they were comfortable when standing about the wreck; that there was no sleet or snow, and no unusual wind, or anything to indicate a cold night. The car had double sash and heavy curtains inside

such room, which rendered her susceptible to tuberculosis, and as a natural and probable result she became afflicted with that disease and died, the carrier is liable. *Chicago, R. I. & G. R. Co. v. Groner*, 43 Tex. Civ. App. 264 (1906).

And in *Missouri, K. & T. R. Co. v. Byrd*, 40 Tex. Civ. App. 315 (1905), it was held that where a woman passenger had become permanently diseased by reason of the carrier's failure to keep its cars sufficiently heated, the fact that her health was in such a condition as to render her susceptible to any dangerous consequences of such exposure, does not relieve the carrier from liability for so exposing her to cold, as a result of which serious illness was produced.

Damages suffered by a man and his family by reason of exposure to incle-

ment weather on account of the carrier's violation of a statute requiring it to have its depot "lighted, warmed and opened to the ingress and egress of all passengers who are entitled to go therein," were held in *St. Louis S. W. R. Co. v. Wallace*, 32 Tex. Civ. App. 312 (1903), to be the proximate cause of the carrier's breach of duty, for which it was liable.

The failure of a carrier to heat its passenger coach, was held in *Sickles v. Missouri, K. & T. R. Co.*, 13 Tex. Civ. App. 434, 10 Am. Neg. Cas. 299 (1896), not to be the proximate cause of injury to one who fell from the train while attempting to pass from one car to another when the train was in rapid motion, in his search to find a warm coach.

In order to recover of a railroad

of the windows. In the car, before the passengers retired, there were six large acetylene lamps each with four burners, burning in the body of the car and in the ceiling over the aisle. There was also one smaller lamp in the smoker, one in the drawing room, one over the door of the smoking room, and four toilet-room and two aisle lamps. The testimony is uncontradicted that these lamps give out considerable heat; also that after the passengers retired two of these lamps were left burning. One of these four-burner lamps was in front of plaintiff's berth. Every berth had heavy curtains in front, and was furnished with a pair of heavy woolen blankets and two sheets as covers.

Plaintiff claims there was a sudden drop of temperature in the car. This claim is wholly unsubstantiated by any direct evidence, and also by all reasonable inferences to be drawn from the whole testimony in the case. It does not appear that the doors or windows of the sleeper were open in the evening, except, perhaps some of the deck sash. But, even if they were, in the absence of a strong wind, and there is no evidence of any, it is a matter of common knowledge that such a car, standing upon the track and being sufficiently heated at 11:30 o'clock P. M., so that both plaintiff and other passengers felt comfortable, would not cool suddenly. The cooling would be the result of gradual radiation of heat, and the process would be a slow one. Especially must that be so in an outside temperature of about 58 degrees. So it cannot be said the evidence shows any sudden change in temperature. Indeed, the uncontradicted evidence, and all reasonable inferences that

company for injuries to health caused by failure to heat a car, the passenger must show that the proximate cause of his condition was the insufficient heating of the car, and not the exposure to severe weather generally prevailing. *Louisville & N. R. Co. v. Scalf*, 33 Ky. Law Rep. 721 (1908).

VI. Contributory Negligence of Passenger.

A woman passenger is not chargeable with negligence in remaining in a cold passenger coach in order that she may complete her journey; it is, however, her duty to employ such means and resources as are reasonably within her reach while on the car to avoid the injurious effects of the cold; if she has wraps with her it is her

duty to use them. *Atlantic Coast Line R. Co. v. Powell*, 127 Ga. 805, 9 L. R. A. (N. S.) 769 (1907).

In *Louisville & N. R. Co. v. Daugherty*, 37 Ky. Law Rep. 1392, 15 L. R. A. (N. S.) 740 (1908), the court held that a passenger who is exposed to the inclemency of the weather must exercise reasonable care and prudence to minimize or prevent any injurious results.

A passenger upon a railroad train cannot be said, as a matter of law, to be guilty of such contributory negligence as will preclude his right to recover for injuries to his health resulting from the failure of the carrier to provide heat during a cold night in a car in which there were stoves and ample opportunity to supply the needed heat,

can be drawn therefrom, are to the effect that, if there was a change, it was a slow and gradual one.

On the evening of the 11th plaintiff took a Turkish bath at Minneapolis, and remained in the bathrooms all night. During the day of the 12th he went to different offices and mills in the city of Minneapolis. There was a light shower during the afternoon, but he was not exposed to it. There is an entire absence of evidence as to what exposure, if any, plaintiff had been subjected to previous to the time he left Escanaba for Minneapolis on the night of the 10th. He testified, however, that he never felt better than he did when he left home, and that he felt all right when he left Minneapolis on Saturday evening at 6:30.

The above is a fair summary of all the material evidence concerning the conditions under which plaintiff slept in the car. If any legitimate inference can be drawn therefrom, it must be to the effect that plaintiff's pneumonia was not caused by the atmospheric conditions that obtained in the car while he slept, or while he was awake. But it is not necessary, in order to sustain the action of the trial court, to draw any such inference. If it appears that it cannot be said with any reasonable certainty that plaintiff's pneumonia was caused by the atmospheric conditions of the car, or that they were such as to render it dangerous for healthy persons to sleep therein, protected as the passengers were, then the court's action must be sustained. Verdicts cau-

by remaining on the train after he had an opportunity to get off, or by neglecting to procure wraps from his trunk in the baggage car, or by taking off his overcoat to give to his wife who was greatly in need of the same, or by his wearing inadequate clothing to meet the demands of the climate and season of the year. *Taylor v. Wabash R. Co. (Mo.)*, 38 S. W. 304, 42 L. R. A. 110 (1896).

The failure of a woman passenger to leave an unheated car in which she was riding and enter another car attached to the train, was held in *Texas & N. O. R. Co. v. Harrington*, 44 Tex. Civ. App. 386 (1906), not to constitute contributory negligence defeating her right to recover for injuries sustained in consequence of the failure of the carrier to heat the coach, where it appeared that a smoking car, sleeper,

and coach set apart for colored passengers were warm, but it was not shown that she knew that a sleeping car was attached to the train or that the other two coaches were warm, and no one to whom she made complaint about the condition of the car told her to go into the other cars, and she could not, without violating the law, enter the negro coach, and was not permitted, being a woman, to enter the smoking car.

In an action against a railroad company to recover damages for personal injuries caused by contracting a severe cold while traveling, the failure of the plaintiff, who was inexperienced in traveling, to call the attention of the employees of the carrier to the cold condition of the car, does not preclude a recovery; but the effect of such failure, as bearing upon the ques-

not rest upon mere conjecture. They must be bottomed at least upon a reasonable certainty. In this case, under the whole evidence it is a matter of pure conjecture where plaintiff contracted his pneumonia, and the trial court properly amended the verdict and directed judgment for the defendant.

BY THE COURT: Judgment affirmed.

tion of contributory negligence, should be left for the jury to determine. **Hastings v. Northern Pac. R. Co.**, 53 Fed. 224, 10 Am. Neg. Cas. 689n (1892).

A person who had not enlisted as a member of the state guards, but who accompanied them at the request of the captain to make the quota of the company complete, and who had the right to leave the passenger coach occupied by the company after discov-

ering its filthy condition and insufficient heating, without subjecting himself to military discipline, and to take passage in another car free from such conditions, but who elected to ride with the other members of the company, cannot recover damages in consequence of catching a severe cold. **Louisville & N. R. Co. v. Scalf**, 33 Ky. Law Rep. 721 (1908).

MUNROE et al. v. CITY OF CHICAGO.

[U. S. Circuit Court of Appeals, Seventh Circuit, E. D. Northern District, Illinois,

January 2, 1912.]

194 Fed. 936.

Collision—Bridge—Liability.

A steamer which has signaled for a bascule bridge over the Chicago River to open, is not at fault for proceeding at slow speed, upon the assumption that the bridge will open, nor in continuing to approach until but 200 or 300 feet away, in the absence of any warning that the bridge could not or would not be opened, where the master of the steamer could hear others calling upon the bridge tender to open the bridge, so as to bar a recovery for damages sustained by the boat when it came into contact with the bridge by being carried along by her own momentum and the current of the river.

Appeal from the District Court of United States for the Eastern Division of the Northern District of Illinois (186 Fed. 564), in a suit in admiralty to recover damages sustained by a steamer caused by a collision with a bridge alleged to be due to the negligence of the City of Chicago in maintaining and operating such bridge. Reversed.

For appellant—Charles E. Kremer.

For appellee—Wm. H. Sexton.

LIBEL.

In the District Court of the United States, for the Northern District of Illinois, Northern Division.

To the Honorable, the Judge of said Court:

The libel of William Munroe and the Michigan Trust Company, executors of the estate of Thomas Munroe, William Brinen, A. F. Temple and W. J. Brinen, of Muskegon, Michigan, against the City of Chicago, in a cause of collision civil and maritime, alleges as follows, to wit:

1st: That at the different times hereinafter mentioned and now the above named libelants were and are the owners of the steamer George C. Markham, a vessel of more than 20 tons burden, enrolled and licensed

NOTE.

For other cases involving the Liability of Municipal Corporations for

Injuries to Vessels Colliding with Bridges, see 4 Am. Neg. Rep. 96, and 7 Am. Neg. Rep. 111.

for the coasting trade and employed in commerce and navigation upon the Great Lakes and waters emptying into and connecting with the same.

2nd: That at the different times hereinafter mentioned, the City of Chicago was a municipal corporation, created and existing under the laws of the State of Illinois, and was the sole owner of a certain bascule bridge erected by it across the south branch of the Chicago River at Taylor street, in the City of Chicago, said bridge being operated by the servants and employees of the said City of Chicago and used for the purpose of carrying persons and vehicles across the said river at Taylor street.

3rd: That on the 19th day of October, 1909, at about 4 o'clock A. M., said steamer George C. Markham, with her lights properly displayed and burning, laden with a cargo of lumber, was bound up the south branch of the Chicago River to deliver the said cargo at a point above the said bridge. That when the said steamer arrived at a point about a quarter of a mile below and to the northward of the said bridge her whistle blew three blasts as a signal for opening the Taylor street bridge across the said south branch of the river. That after the steamer had proceeded slowly for a distance of about her length, not hearing any signal from the said bridge, the steamer again blew her whistle as a signal for the said bridge to open, and proceeding still a little farther the signal was again repeated. Receiving no response to the last signal indicating that the said bridge would open and though no signal was displayed or given indicating that it would not open, fearing that it might not be opened in time to permit the said steamer to safely pass under the same, the steamer's engine was reversed to check her headway, and in this way she approached the bridge very slowly until she arrived at a point when it was no longer safe to proceed as the bridge could not be opened in time to avoid a collision, whereupon the engine was backed full speed and every effort made to stop the headway of the steamer, and although this was stopped the current carried her against the bridge which resulted in breaking her foremast, pilot house and doing other damage to her, but without inflicting any damage upon the said bridge.

4th: That after the said collision the said bridge was opened and without difficulty and the steamer passed on through the same.

5th: Libelant further alleges that before and at the time of the said collision, the atmosphere was clear and the said steamer and her lights could have been seen a long distance away below the said bridge, and that signals were blown in the usual way at ample and sufficient distance to enable the said bridge to be raised without haste

or difficulty, and had the same been raised even after the third signal for the said bridge to open, no collision could have occurred.

6th: That the said collision was due to the fact that the said bridge tenders were not awake or attentive to their duties, but, on the contrary, were negligent and careless in the performance of their business and neglected to open the said bridge when signaled to do so.

7th: That the libelant has been damaged in the cost of repairs and in the loss of the use of said steamer while being repaired, and that further repairs will be necessary to restore said steamer to the condition in which she was before the collision, all of which damages amount to the sum of One Thousand Dollars (\$1,000).

8th: That demand has been made upon the said City of Chicago for payment of the said damages, but the servants of the said City of Chicago in charge of the said bridge deny all liability and the said City of Chicago has therefore refused to pay any part of the said damages.

Wherefore, libelant prays that process in due form of law may issue against the said City of Chicago and that it may be cited to appear and answer all and singular the matters and things hereinabove set forth, and that this court would be pleased to pronounce for libelant's aforesaid demand and decree the same paid, with costs and interest, and for such other and further relief and redress as in law and justice libelant is entitled to receive.

ANSWER.

The answer of the City of Chicago, a municipal corporation, duly organized and existing under and by virtue of the laws of the State of Illinois, to the libel of William Munroe and Michigan Trust Company, executors of the estate of Thomas Munroe, William Brinen, A. F. Temple and W. J. Brinen, alleges as follows:

(1) This respondent is not advised as to whether or not the persons named as libelants or any or either of them were the owners of the steamer "George C. Markham" at the time and times in said libel mentioned, and therefore, asks strict proof thereof.

(2) This respondent, further answering, admits that at the time in said libel mentioned it was a municipal corporation and that it was the sole owner of the bascule bridge erected across the south branch of the Chicago River at Taylor street in the City of Chicago, and that said bridge was being operated by persons hired and paid by the City of Chicago, but charges the fact to be that said bridge was a part of the public highway of the State of Illinois and therefore charges the

fact to be that said persons were in law the servants of the State of Illinois.

(3) Further answering, this respondent admits that when said steamer "George C. Markham" approached said Taylor street bridge at the time in question, it did not signal for Taylor street bridge until after it had passed through the railroad bridge lying a short distance from said Taylor street bridge, and that the said "George C. Markham" did not slacken her speed until she struck said Taylor street bridge, and after said signal was given no signal was given in response thereto from said bridge for said steamer to approach, because it was discovered that said bridge could not be opened, and that signals indicating such fact were constantly displayed from the time that said steamer signaled for said bridge until the time that she struck said bridge.

(4) Further answering, this respondent says that said collision was due solely to the fact that said steamer did not obey the signals displayed on said bridge to the effect that said bridge could not be opened, and to the further fact that said steamer was proceeding at a rate of speed prohibited by the ordinance of the City of Chicago relative thereto; and that it is not true that the bridge-tenders on said bridge were not awake or that they did not attend to their duties, and that the fact is that they were in nowise negligent relative thereto.

(5) Further answering, this respondent says that it is not true that said steamer was damaged to the extent of One Thousand Dollars (\$1,000).

(6) Further answering, this respondent says that at the time said steamer collided with said bridge in said libel mentioned there was in full force and effect certain valid ordinances of said city, sections 992, 993 and 994 of which are in words and figures following, to wit:

"992. VESSEL SIGNALS—The commissioner of public works is hereby required to provide and maintain at the several bridges over the Chicago river and its branches and the Calumet river, in the best and most practical manner, vessel signals as required by this article.

"993. Signals Prescribed. Each signal shall be a ball of suitable material of red color for use in the day time, and shall be not less than twenty-four inches in diameter. The signal for the night-time shall be a red lantern of such size and so placed and arranged when elevated, as to be easily seen up and down the river and the street.

Such signals shall be elevated when upon the approach of any vessel, such vessel having signaled for the bridge, the bridge tender for any reason cannot open such bridge, and the same shall remain elevated until the bridge can be opened.

Provided also that after any bridge has been open for the purpose of permitting vessels to pass through, the proper signal shall be elevated before the bridge is closed and be kept elevated for fully ten minutes for such persons, teams, or vehicles as may be in waiting to pass over, if so much time shall be required when such signals shall be lowered. At all other times such signals shall remain lowered.

"994. Duty of Vessels—Penalty. It shall be unlawful for the owner, officer, or other person in charge of any vessel in transit upon the Chicago river and its branches, or the Calumet river or any part thereof, to attempt to navigate any such vessel past any of the bridges over said river or branches while said signals are elevated, or while the said bridges or any of them may be opening or closing.

Any person who shall violate any provision of this section shall be fined not less than ten dollars nor more than fifty dollars for each offense."

(7) Further answering, this respondent says that at the time aforesaid there was in full force and effect a certain other valid ordinance of the City of Chicago with reference to the rules of navigation upon the rivers lying within the City of Chicago, and that paragraph 8 of section 1015 of said ordinance was in words and figures following, to-wit:

"Vessels exceeding two hundred tons navigating the Chicago harbor shall not proceed at a speed greater than four miles per hour."

But, notwithstanding the fact that the steamer "George C. Markham" was of more than two hundred tons burden at the time she was navigating the river aforesaid and at the time she approached and struck said bridge as aforesaid she was navigating at a rate of speed far in excess of four miles per hour.

(8) Further answering, this respondent says that the persons in charge of said steamer at the time of the accident in question attempted to navigate said vessel past the Taylor street bridge while the signals, in the ordinance first mentioned herein, were elevated, and that said persons also attempted to navigate said vessel through the draw of said bridge before said bridge was opened and before it had been started to open.

(9) This respondent denies all and singular that the premises in said libel contained are true.

(10) That all and singular the premises herein contained are true.

Wherefore, this respondent prays this Honorable Court to please to pronounce against the libel aforesaid and condemn the libellant to costs, and otherwise law and justice to administer in the premises.

STATEMENT OF FACTS: "On October 19, 1909, the steamer Markham was bound up the Chicago river, and while opposite Polk street signaled for the Taylor street bridge. The first signal was given when about 800 feet from the bridge. The Markham was proceeding under slow check, as slow, in fact, as it was possible for her to go and maintain steerage. It was about 5 o'clock in the morning. The atmosphere was clear, and the captain could see the two red lights in the center of the bridge. This bridge was of the jack-knife or bascule variety, and was equipped with the lights prescribed by the Lighthouse Board under the direction of the Department of Commerce and Labor, namely: There were placed on each leaf, near the point where they touched, and on the upstream and downstream sides, a square lantern swinging behind a frame containing a circular panel of red and green colored glass, with the result that when the bridge was closed there would be shown on the upstream and downstream sides two red lights close together in the center of the bridge, and when completely open two green lights at an elevation on each side of the opening. There were also stationary red lights at the lower side of each leaf, showing the width of the channel. The lights in the center of the bridge flashed red when the bridge was down, and green when the bridge was open. On the morning of the accident, the bridge was down, with the two red lights in the center showing, indicating that the bridge was closed.

"When the Markham had proceeded 200 or 250 feet, after her first signal, her master signaled again for the bridge to open. The bridge was not opened, nor was any bell rung (indicating to those on the street that the bridge was opening, or about to be opened), nor was any other signal given which could have led the master of the vessel to believe that the bridge was to be opened. The steamer then proceeded about 200 feet further down stream, when she signaled a third time and stopped her engines. The current was carrying the boat towards the bridge at about 3 miles an hour, and the captain, at this point realizing that the bridge was not going to open, backed the steamer. The momentum of the boat, however, carried it against the bridge, and a damage resulted, it is claimed, of \$1,000. The pilot house was taken off and one of the spars broken."

SEAMAN, Circuit Judge, (after stating the foregoing facts). The appellants' libel was dismissed upon final hearing, pursuant to the conclusion stated in the opinion of the trial court, that "the accident in this case was due entirely to the fault of the master of the steamer." All material facts—both in reference to the navigation of

the steamer and of alleged negligence on the part of the city, whereon reversal is sought—are undisputed under the testimony, and we believe the rule of admiralty law which must be applied thereto leaves the inferences of ultimate fact free from difficulty. In *Clement v. Metropolitan West Side E. Ry. Co.*, 123 Fed. 271, 273, 59 C. C. A. 289, 291, Judge Jenkins, speaking for this court, thus aptly defines the duties of the parties respectively:

“A bridge spanning a navigable river is an obstruction to navigation, tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary; the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition thereto. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights, giving warning of the position of the bridge and of its opening and closing. If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding (*City of Chicago v. Mullen*, 54 C. C. A. 94, 116 Fed. 292), but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened (*Manistee Lumber Co. v. City of Chicago* [D. C.] 44 Fed. 87; *Central R. Co. of N. J. v. Penn. R. Co.*, 8 C. C. A. 86, 59 Fed. 192), when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern.”

And we understand the rule so stated to be the well-established doctrine of admiralty, applicable to the case at bar. As the opinion of the trial court recites (in conformity with the testimony), the steamer, laden with lumber, bound up the Chicago river, was about “800 feet from the bridge” when her “first signal was given,” and “was proceeding under slow check as slow in fact, as it was possible for her to go and maintain steerage,” moving with a current (vari-

ously estimated) at 2 or 3 miles an hour. Her signal for the bridge was twice repeated, with headway under further check, until within about 200 feet of the bridge, when she attempted to stop and back up, on discovering that no start was made in opening the draw. She was then unable to keep away from the bridge and the collision ensued. These occurrences were about 5 o'clock in the morning, "the atmosphere was clear," and the "two red lights in the center of the bridge" were in plain view throughout the approach. The finding of fault on the part of the steamer is therein predicated substantially: That these lights "complied with the requirements of the Lighthouse Board;" that the master of the steamer knew, when 800 feet away, that the "bridge was down;" that "the bridge tender gave no signal to proceed" and "no indication that the bridge was going to open," so that the master was not misled; and that "there was no time when he had any right to believe that the bridge was going to open," and he was bound "to keep his boat under such control" as to avoid collision. We believe this conclusion to be inconsistent with the above-mentioned rule, that "in the absence of proper warning" the vessel has "the right to assume that the bridge will be timely opened for passage," and that it cannot be upheld in the light of further circumstances which appear in evidence.

The regulations of the Lighthouse Board referred to (for display of two red lights) are applicable alike to all bridges spanning navigable waters, in thoroughfares of all grades of use, to indicate whether the draw is closed or open, so that the lights are down when the bridge is normally closed, and are in no sense indicative that the bridge will not open, on signal, for passage of a vessel. In populous cities, having numerous bridges over navigable waters, regulation may be needful, consistent as well with the rights of navigation and with the requirements of street traffic, and other exigencies, to give warning when a bridge cannot be immediately opened for passage of a vessel. So the City of Chicago has provided by ordinance for "vessel signals" to be maintained "at the several bridges over the Chicago river and its branches," (§ 992), to consist of a red ball for use in the daytime and a red lantern (as specified) for the night time, to be elevated on the bridge "when the approach of any vessel," having "signaled for the bridge," the "bridge tender for any reason cannot open the bridge," and so remain until it can be opened (§ 993). The reasonableness of this provision is unquestioned, and we believe it entitles the navigator to expect such warning, if any cause prevented opening of the bridge upon his signal for it. Not only was no such warning given—nor notice in any form that the

bridge could or would not be opened for the steamer—but it appears in evidence that this bridge was not equipped with such signals, although they were provided and used on other bridges of the city spanning the river. We believe, therefore, that no fault appears in the steamer's approach under the check described, beyond the place of first signal, although it was then observed that "the bridge was down."

But the further question arises whether culpable fault appears in approaching within 200 or 300 feet of the bridge, even under her least speed for keeping steerage; and its solution rests on other circumstances in evidence. The bridge was equipped with electrical power, with a bridge tender on each side to operate the two leaves of the bridge, and the opening was speedily accomplished when power and attendants were in readiness. It appears, however, that one of the bridge tenders had been called from his station and was on the dock when the steamer signaled for the bridge; that, recalled (by the signals or outcries), he hastened to the bridge, and in the excitement of the close approach of the steamer turned on the current so hurriedly that "the fuse blew out," so that the bridge could not be opened until another fuse was inserted, causing such delay that collision could not be avoided. The testimony does not establish the distance of the steamer from the bridge when this fuse accident occurred, but it is fairly presumable that no collision would have occurred otherwise. So—while the appellant's contention of defect in the electrical equipment is unsupported by the evidence—we believe no ground appears for condemnation of the steamer, as not "prudently proceeding under slow speed," in the absence of any warning that the bridge was not properly attended for timely opening. Not only was no warning given of the absence of the bridge tender, but it further appears in evidence that barges passed under the bridge, upbound, during the approach of the steamer, that men on the barges called out to the bridge tenders to open the bridge for the steamer, and that their cries were heard by the master of the steamer, who reasonably assumed that no further delay would occur. Without warning of any cause for delay therein, we believe that the steamer's approach was not unreasonable under the circumstances, and that she was placed in extremis by the failure of the bridge tenders to open the bridge, when it was too late to haul over to the docks—the only other course reasonably open to her, during the approach, to abide the opening.

We are of opinion, therefore, that the collision was caused by failure on the part of the city to provide and give the warning signal, in conformity with its ordinance, that the bridge could not be

opened promptly for an approaching vessel; that when the bridge tender was called away, leaving no one to operate the bridge meantime, the duty arose to give warning of the immediate disability, so that any vessel bound through the bridge in this busy channel could govern its course accordingly; and that the City of Chicago is answerable for the ensuing collision damages.

The decree of the District Court in admiralty is reversed accordingly, with direction to enter a decree in favor of the libelants and proceed thereupon for assessment of damages in conformity with the admiralty rules.

ACME CEMENT PLASTER CO. v. WESTMAN.

[SUPREME COURT OF WYOMING, MARCH 26, 1912.]

— Wyo. —, 122 Pac. 89.

1. Master and Servant—Action for Injuries—Complaint—Sufficiency.

Negligent construction of a coal bin is sufficiently charged in a complaint in an action brought by an employee to recover damages for personal injuries, which alleges that, through the negligence of defendant, plaintiff sustained injury by the falling of a coal bin belonging to defendant, which burst or collapsed because it was built, constructed, and maintained in an unsafe, defective, and insecure manner by defendant, in that the upright posts supporting the same were not fastened or secured by nails, screws, bolts or in any other manner, and were not able to withstand the lateral pressure to which they were subjected by the weight of the coal placed in such bin.

2. Master and Servant—Safe Place to Work—Duty of Master.

A master is not bound to furnish a fireman in a mill an absolutely safe place in which to work.

3. Master and Servant—Action for Injuries—Trial—Instruction.

In an action brought by a fireman employed in a mill to recover damages for personal injuries caused by the collapse of a coal bin due to the alleged insufficiency of certain posts, an instruction to the jury that if the employer knew the peril to which the servant would be exposed, and the posts were not secured by nails, screws or bolts, or in any other manner, and if the plaintiff received injury as alleged, and the employer did not give notice of the defects in the bin to the servant, and if the servant at the time of receiving his injury was in the exercise of ordinary care, then the employer is liable in damages, is erroneous, in that it assumed that the servant was exposed to peril, that the posts were not secure in some way, and that it would lead the jury to conclude that the master was liable for its failure to secure the posts with nails, screws or bolts, especially where the jury were also instructed that, if the posts were otherwise sufficiently secured to make the place reasonably safe, the employer would not be liable.

4. Master and Servant—Injury to Servant—Action—Burden of Proof.

In an action brought to recover damages for personal injuries sustained by a fireman in a mill caused by the collapse of a coal bin, in which the petition charged that the bin was built, constructed, and maintained, in an unsafe, defective, and insecure manner, in that the upright posts supporting the same were not fastened, or secured by nails, screws, or bolts, or in any other manner, the burden rests on the plaintiff to prove not only that the bin fell and injured him, but also that it fell by reason of some defect alleged in his petition; and, therefore, an instruction to the jury that the fall of the bin created a presumption of negligence on the part of the employer, was erroneous.

NOTE.

On the subject of Averments of Negligence in a Complaint, see note in 5 Am. Neg. Rep. 51.

And on the Duty of a Master to Furnish his Servant a Safe Place to Work, see note in 12 Am. Neg. Rep. 251.

5. Trial—Instructions—Cure of Error.

Ordinarily an erroneous instruction is not cured by giving subsequent correct instructions, which are necessarily inconsistent therewith, since it is impossible to tell which instructions the jury followed.

6. Evidence—Proof of Salary Earned—Hearsay—Admissibility.

A witness who did not prepare the pay rolls of an employer, and who has no knowledge of a certain employee's earnings aside from that gained from the pay rolls, is incompetent to testify, by referring to such pay rolls, as to the earnings of such employee in an action brought to recover damages for personal injuries sustained by the latter.

7. Evidence—Statement by Injured Person to Physician—Admissibility.

Statements by an employee injured in the course of his employment made to a physician who treated him, concerning his condition, symptoms, sensations and feelings, both past and present, are admissible where the physician testifies as an expert, for the purpose of affording the jury means of determining the weight to be given to the opinion of such physician, but are inadmissible to show the actual condition of such employee at the time of which he spoke.

In error to the District Court of Albany County to review a judgment rendered in favor of plaintiff, Carl Westman, in an action brought to recover damages for personal injuries caused by the fall of a coal bin while in defendant's employ. **Reversed.**

For plaintiff in error—N. E. Corthell, C. P. Arnold, Herbert V. Lacey, and John W. Lacey.

For defendant in error—F. E. Anderson, and H. V. S. Groesbeck.

BEARD, C. J. Carl Westman, defendant in error, brought this action against the Acme Cement Plaster Company, a corporation, plaintiff in error, to recover damages for a personal injury alleged to have been sustained by reason of the negligence of said company. The case was tried before a jury, which returned a verdict in favor of Westman and against the company for \$11,900. A motion for a new trial was denied and judgment entered on the verdict. The company brings error.

For convenience, the defendant in error will be referred to as plaintiff, and plaintiff as defendant.

The allegations of negligence contained in plaintiff's second amended petition, upon which the case was tried, are as follows: "That on the 5th day of December, A. D. 1908, said plaintiff, while in the service of said defendant, for hire, at its mills and works at and near said city of Laramie, and while in the discharge of his regular duties as fireman, without fault, negligence, or want of ordinary care on his part, but wholly through the gross, willful and wanton carelessness and negligence of said defendant, was dangerously and permanently injured about the head and body by the fall of a coal bin of defend-

ant, which burst or collapsed because it was built, constructed, and maintained in an unsafe, defective, and insecure manner by defendant, in that the upright posts supporting the same were not fastened or secured by nails, screws, bolts, or in any manner whatsoever, and were not able to withstand the lateral pressure to which they were subjected by the weight of the coal in said bin. Plaintiff further alleges that he did not know and had no means of knowing of the defective condition of said coal bin, and that defendant had due and timely knowledge and notice of such condition, and negligently failed to remedy the same or warn plaintiff of such dangerous and defective condition, or take precautions to make the same safe and able to withstand or resist the pressure of the coal upon the upright posts, whereby the said bin burst or collapsed, and large quantities of coal and timbers of wood were hurled upon and against plaintiff, whereby he was dangerously and permanently injured by an upright post of said coal bin, which fell and hit or struck plaintiff," etc. By its answer, defendant denied these allegations, and pleaded contributory negligence on part of plaintiff. The reply denied the allegations of contributory negligence contained in the answer.

It appears by the evidence that the coal bin and the place where the plaintiff worked were in the basement or lower story of defendant's mill, the bin being 9 or 10 feet wide and situated on the west side of the basement; the east side of the bin was constructed by placing planks against a row of posts, which were 9 or 10 by 11 inches in size, 8 or 9 feet in length, and about 9 or 10 feet apart. These posts rested on cement or stone bases at the bottom of the bin, and supported a main stringer of the building above; each post having a cap 3 or 4 feet in length on its top, upon which the stringer rested. East of the bin there was a space 10 or 11 feet wide between the bin and the kettles which plaintiff was employed in firing. The coal was put in the bin from the west side, and at the time of the accident was 5 or 6 feet high at the east side of the bin. The room above, the floor of which was supported by the posts, was used for storing plaster, cement, hair and other material, and at the time there was stored in that room 32 tons of plaster and 11 tons of cement. Sometimes there was more and sometimes less stored there. The building had been used for the same purpose and in the same manner for 4 or 5 years. The plaintiff was injured by the falling of one of these posts.

It is contended by counsel for defendant that there is no allegation of negligent construction of the bin contained in plaintiff's petition. But we think, liberally construed, it does charge that it was negligently constructed, in that the posts were not secured in any man-

ner sufficiently to withstand the pressure of the coal against them. The evidence shows, beyond dispute, that the posts were not fastened or secured by nails, screws, or bolts, but were held in place by the weight which rested upon them, and that this had been sufficient for that purpose from the time the building had been constructed or so used—four or five years—up to the time of the happening of the accident. It was therefore an important issue of fact, to be submitted to the jury upon proper instructions, whether or not such construction of the bin was negligent. The defendant was not required to furnish an absolutely safe place for plaintiff to work in, or to secure the posts in any particular manner. Its duty was to exercise such care in the construction of the bin, and such diligence in maintaining it, as to afford a reasonably safe place for the purpose for which it was used.

The court, over the objection of defendant, instructed the jury as follows: "Instruction No. 11. If the jury find and believe from the evidence that the defendant company and its officers knew or had reason to know the peril and danger to which the plaintiff was and would be exposed while in the work and employment in which he was engaged at the time of receiving the injury complained of in his petition, and did know or had reason to know of the defects complained of, in this, the upright post supporting the same was not fastened or secured by nails, screws, bolts, or in any manner whatsoever, and if you find from the evidence that the plaintiff did receive such injuries, and said defendant company did not make known and had not made known and had not given notice of such danger, peril, and defects to the plaintiff, and if the jury further find that at the time of receiving such injury the plaintiff was exercising ordinary care in the work in which he was engaged, and, without fault or blame on his part, was so injured, then the defendant is liable in damages, and you should find for the plaintiff." This instruction was erroneous and misleading. It assumes that the plaintiff was and would be exposed to perils and dangers, and that the defects complained of existed; and if it does not also assume that a failure to fasten or secure the posts with nails, screws, or bolts was a defect for which the defendant would be liable, it would certainly tend to so impress the jury, and lead it to conclude that a failure to so secure the posts would constitute negligence on the part of the defendant. Nor was the jury informed in any instruction that a failure to so secure the post would not constitute negligence for which defendant would be liable, if the jury found that the post was otherwise sufficiently secured to make the place reasonably safe for the purposes for which it was used.

The court also gave the following instruction, over the objection of the defendant: "Instruction No. 12. The defendant company was bound to use reasonable care to provide a reasonably safe coal bin near which plaintiff worked, and if you find from the evidence that said coal bin was under the management of said defendant company or its servants, and that the same burst and collapsed, owing to the want of proper care on the part of said defendant company, and injured the plaintiff, and such falling of the coal bin was of such an event that, in the ordinary course of things the same would not have happened if said defendant company had used proper care, then such falling of the coal bin, in the absence of evidence to the contrary, is evidence that it arose from the lack of care on the part of the defendant company, and the unexplained falling of said coal bin creates a presumption of negligence on the part of the defendant." The instruction is ambiguous, in that the jury was told that, if the bin burst and collapsed owing to the want of proper care on the part of defendant, then, under certain conditions, the falling of the bin was evidence that it arose from the lack of ordinary care, and created a presumption of negligence on the part of defendant. The only negligence charged in the petition was that the bin was built, constructed, and maintained in an unsafe, defective, and insecure manner, in that the upright posts supporting the same were not fastened or secured by nails, screws, or bolts, or in any manner whatsoever. The burden rested upon the plaintiff to prove, not only that the bin fell and injured him, but also that it fell by reason of some defect alleged in his petition.

It is not in all cases that proof of the happening of an accident raises a presumption of negligence. Indeed, it has been held by many courts that the doctrine *res ipsa loquitur* does not apply in an action by an employee against his employer. The Supreme Court of the United States, in *Patton v. Texas & P. Ry. Co.*, 197 U. S. 658-663, 21 Sup. Ct. 275, 277 (45 L. Ed. 361), states the rule thus: "That, while in the case of a passenger, the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely (*Stokes v. Saltonstall*, 13 Pet. 181 [7 Am. Neg. Cas. 297, 10 L. Ed. 1151]; *New Jersey R. Co. v. Pollard*, 22 Wall. 341 [7 Am. Neg. Cas. 325, 22 L. Ed. 877]; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 443 [10 Am. Neg. Cas. 644, 11 Sup. Ct. 859, 35 L. Ed. 458]), a different rule obtains as to an employee. The fact of accident carries with it no presumption of negli-

gence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & P. Ry. Co. v. Barrett*, 166 U. S. 617 [1 Am. Neg. Rep. 745, 17 Sup. Ct. 707, 41 L. Ed. 1136]."

In *Spees v. Boggs*, 198 Pa. 112, 47 Atl. 875, 52 L. R. A. 933, 82 Am. St. Rep. 792, the court said: "Except in the case of a carrier, the rule is uniform that, where recovery is sought on the ground of negligence of the defendant, the burden of proof is on the plaintiff, and in an action against an employer some specific act of negligence must be shown." See, also, *City of Greeley v. Foster*, 32 Colo. 292, 75 Pac. 351; *Price v. Railroad Co.*, 202 Pa. 176, 51 Atl. 756; *Case v. C., R. I. & P. Ry. Co.*, 64 Iowa, 762, 21 N. W. 30; *Kuhns v. Wisconsin, Iowa & Neb. Ry. Co.*, 70 Iowa, 561, 14 Am. Neg. Cas. 649n, 31 N. W. 868. In the last cited case, the court instructed the jury as follows: "But, if you are satisfied from the evidence that the accident in question, by which plaintiff's decedent lost his life, was unusual and extraordinary, and one that in the ordinary use of railways would not happen, it is your privilege to consider the fact of such accident as one of the circumstances from which you are to determine whether or not the roadbed or engine were in fact in reasonably good order and condition." The court said: "It is claimed that this instruction is in accord with *Tuttle v. Chicago R. I. & P. R. Co.*, 48 Iowa, 236, 9 Am. Neg. Cas. 332n. But in that case the plaintiff was a passenger, and in such case the rule is that the accident, when established, casts on the defendant the burden of showing there was no negligence on its part which contributed to the accident. In this case, the rule is different, and the fact that there has been an accident, whether ordinary or extraordinary, has no tendency to prove negligence. If this is the rule, then all the plaintiff had to do was to prove the accident, and he would be entitled to recover, unless the defendant assumed the burden of proving it was not negligent; and this it was not bound to do. If the accident can be regarded as a circumstance tending to show negligence, then the burden may be shifted in all cases, and the jury might regard it as sufficient to enable the plaintiff to recover. *Case v. Chicago, R. I. & P. Ry. Co.*, 64 Iowa, 762, 21 N. W. 30."

In *McGrath v. St. Louis Transit Co.*, 197 Mo. 97, 94 S. W. 872, it is said: "This is not a case, under the facts disclosed, where *res ipsa loquitur* applies. It has been said that there are but two classes of cases wherein this doctrine can be invoked: '(1) When the relation of carrier and passenger exists, and the accident arises from some abnormal condition in the department of actual transportation; (2)

where the injury arises from some condition or event that is, in its very nature, so obviously destructive of the safety of person or property, and is so tortious in its quality, as, in the first instance, at least, to permit of no inference, save that of negligence on the part of the person in control of the injurious agency.' *Benedick v. Potts*, 88 Md. 52 [4 Am. Neg. Rep. 484, 40 Atl. 1067, 41 L. R. A. 478] * * *. But even if it were a case to which, under proper pleadings, the doctrine would apply, yet in this case specific acts of negligence are charged, and not general negligence. In such cases, where the plaintiff chooses in the petition to allege specific acts of negligence, the rule of law places the burden of proving such specific negligence upon the plaintiff, and a recovery, if had at all, must be upon the specific negligence pleaded." (Citing many cases).

The evidence in the present case does not bring it within either class of cases above stated. It is not claimed that it comes within the first class, and the evidence does not show that the injury arose from a condition that, in its nature, was so obviously destructive of the safety of person or property or so tortious in quality as to permit of no inference, save that of negligence on part of defendant. The evidence tends to show that the bin had been used for the same purpose for four or five years and apparently sufficient for that purpose and without accident; and there was evidence from which the jury might have found that the cause of its fall was, not that the post was not sufficiently secured to withstand the lateral pressure of the coal, but because large chunks of coal had been thrown against the post some time before the accident, which loosened it; and plaintiff testified that the coal was put in the bin by a man who had a contract to do so. There is no affirmative evidence that the manner in which the bin was constructed was not such as would be adopted by men of ordinary prudence under like circumstances, or that such construction was negligence, other than the fact that the post fell. Under the circumstances stated the mere fact of the unexplained falling of the post (if, in this case, it can be said to be unexplained) is not *prima facie* evidence of negligence in construction. *Piehl v. Albany Ry.*, 30 App. Div. 166, 51 N. Y. Supp. 755, affirmed in 162 N. Y. 617, 57 N. E. 1122 mem. The instruction was not applicable to the evidence and therefore erroneous, and should have been refused.

Counsel for plaintiff contend that the giving of these instructions, if erroneous, was not prejudicial error, for the reason that in other instructions given the jury was otherwise and correctly instructed. With that contention we cannot agree. The instructions were quite lengthy, consisting of 27 paragraphs, containing inconsistent and con-

fusing statements. While it is true that inconsistent instructions will not be held to be prejudicial and require a reversal of the judgment in a case where the appellate court can see from the evidence and the verdict that the jury must have followed the correct one, the rule is otherwise where it appears that the jury may have, or properly did, follow the erroneous one. "Ordinarily an erroneous instruction is not cured by the giving of subsequent correct instructions, necessarily inconsistent therewith, since it is impossible to tell which charge the jury followed." 38 Cyc. 1782, and cases cited in notes.

Over the objection of defendant, Mr. Henderson, a witness for plaintiff, was permitted to state from a copy of the pay rolls of the rolling mill where plaintiff worked before and after the accident, the amount plaintiff earned each month from October, 1906, to February, 1908, before he was injured, and for May, June, July, August and September, 1909, after he was injured. Counsel for plaintiff have devoted considerable space in their brief to a discussion of the question when, and under what circumstances, a copy of an instrument or writing may be used by a witness to refresh his recollection; but that question is not presented by the record. The witness was not shown to have had anything to do with paying the plaintiff, or in the preparation of the pay rolls, from the copies of which he stated the several amounts, or in any way, or at any time, had any personal knowledge of plaintiff's earnings while so employed. After stating his name, the witness testified as follows: "Q. What is your occupation, Mr. Henderson? A. Chief clerk at the rolling mill at the present time. Q. As such chief clerk, have you access to the records and pay rolls of the rolling mill during the years 1906, 1907, and 1908? A. No, sir. Q. Well, have you access to those records? A. No; not the original pay rolls. Q. What have you access to? A. All that I have is the copy that we sent to Omaha at the time. Q. Is that an exact copy of the original? A. Yes, sir. Q. Do you know when these original records which you spoke of, were sent to Omaha? A. They go in the 5th of each month. Q. Are they in Omaha at the present time? A. Yes, sir. Q. Are they ever brought back to this mill in Laramie? A. Not to my knowledge." Upon that showing, the witness was permitted to state the amounts from the copy referred to. It is apparent that there was an entire failure to show that the witness ever had any knowledge of the plaintiff's earnings, except from the pay rolls; and, not having any previous knowledge, of course, he could have no recollection to be refreshed. The testimony was incompetent, and should have been excluded.

Dr. McLean, one of the physicians who attended and treated plain-

tiff for the injury, was called as a witness on behalf of plaintiff for the injury and gave his opinion as to the extent and permanency of the injury, and also as to the necessity of the performance of a surgical operation which had been performed on plaintiff's head as a part of such treatment. He was permitted to testify, over the objection of defendant, to statements made to him by plaintiff in relation to his condition, sensations, and feelings in the past; and that ruling is assigned as error. The rule seems to be quite well settled that such statements of the party injured, narrative of past conditions or suffering, made by the ordinary witness are inadmissible; but "a physician may, however, testify to a statement or narrative given by a patient in relation to his condition, symptoms, sensations, and feelings, both past and present, when such statements were received during and were necessary to an examination with a view to treatment, or when they are necessary to enable him to give his opinion as an expert witness." *Cleveland, C., C. & I. R. R. Co. v. Newell*, 104 Ind. 264, 9 Am. Neg. Cas. 289n, 3 N. E. 836, 54 Am. Rep. 312. See also, *Union Pac. R. Co. v. Novak*, 61 Fed. 573, 9 C. C. A. 629; *Stone v. Moore*, 83 Iowa, 186, 49 N. W. 76; *Fort v. Brown*, 46 Barb. (N. Y.) 366; *Johnson v. N. P. R. Co.*, 47 Minn. 430, 50 N. W. 473; *Pullman P. Car Co. v. Smith*, 79 Tex. 468, 14 S. W. 993, 14 L. R. A. 215, 23 Am. St. Rep. 356; *Barber v. Merriam*, 11 Allen (Mass.) 322; *Consolidated T. Co. v. Lambertson*, 59 N. J. Law, 297, 12 Am. Neg. Cas. 275n, 36 Atl. 100; and 5 Enc. Evidence 608. This evidence was admissible for the purpose of affording the jury the means of determining the weight to be given to the opinion of the physician, but not as evidence tending to prove the actual condition of the plaintiff at the time of which he spoke, and the jury should have been so cautioned. For the purpose indicated, there was no error in admitting the testimony.

For the reasons stated, the judgment of the district court is reversed, and the case remanded for a new trial.

Reversed and remanded.

SCOTT and POTTER, JJ., concur.

BROOKS, SCANLON, O'BRIEN COMPANY v. FAKKEMA.

[SUPREME COURT OF CANADA, APRIL 3, 1911.]

44 Can. Sup. Ct. Rep. 412.

1. Master and Servant—Negligence—Safe Place.

The placing of an engine used for breaking jams in a logging slide, so near the foot of the chute as to endanger the engineer, is such negligence as will render the employer liable for injuries sustained by him from a log which jumped the side of the chute.

2. Master and Servant—Contributory Negligence—Post of Duty.

An engineer who reasonably believes that it is his duty to be at his engine, set at the bottom of a logging slide for use in breaking jams, and who is injured by a log which jumped the side of the chute and rolled down the mountain, is not chargeable with contributory negligence because he remained at his post.

3. Master and Servant—Assumption of Risk—Complaint.

A servant who calls attention to the danger of the position assigned to him and asks for protection against injury, cannot be said, as matter of law, voluntarily to assume the risk of injury from the danger indicated.

Appeal from a judgment of the Court of Appeal for British Columbia (15 B. C. Rep. 461), which affirmed a judgment in favor of plaintiff, Rhine Fakkema, in an action brought to recover damages for injuries sustained while employed in a logging camp.

For appellants—Mr. Ewart, K. C.

For respondent—Mr. J. Travers Lewis, K. C.

STATEMENT OF FACTS: The plaintiff was employed by the company to operate an engine used for breaking jams in a logging

NOTE.

On the subject of the Duty of a Master to Furnish his Servant a Safe Place to Work, see note in 12 Am. Neg. Rep. 251.

And on the subject of Assumption of Risk, see notes in 5 Am. Neg. Rep. 22; 7 Am. Neg. Rep. 72, 97, 588; 8 Am. Neg. Rep. 71, 90, 183, 638; 9 Am. Neg. Rep. 196, 280, 306, 467; 10 Am. Neg. Rep. 212; 11 Am. Neg. Rep. 92.

And on these subjects generally, see

Vols. 13-16 Am. Neg. Cas., where "Master and Servant Cases" in the several States and Territories and the Federal and Supreme Courts of the United States, from the earliest period to 1896, are reported and classified and arranged in alphabetical order of States; and for subsequent cases to date on the same subjects, see Vols. 1-21 Am. Neg. Rep., and this volume (1 N. C. C. A.) and succeeding volumes of the Negligence and Compensation Cases Annotated.

slide constructed on the side of a mountain. The engine was placed at the foot of the chute, near the water where the logs were to be boomed; its position was changed from time to time, upon the orders of an experienced foreman, and at the time of the accident by which the plaintiff received his injuries it was near the foot of the slide down which logs were coming with considerable speed. A log jumped the side of the chute and rolled down the mountain side breaking the plaintiff's leg and causing him other injuries while he was standing near his engine. The jury, without being asked to answer questions, found that the engine had been placed too near the chute and gave a verdict for the plaintiff, assessing damages at \$4500, for which judgment was entered at the trial. This judgment was affirmed by the judgment appealed from.

IDINGTON, J. This case is founded on the common law liability of an employer, for negligence in failing to take due care of his servant engaged in a highly dangerous occupation.

The jury under the direction of the learned trial judge, in a charge to which no objection was taken by appellant's counsel, found a verdict for plaintiff (respondent here) of \$4,500 for which judgment was entered.

The Court of Appeal for British Columbia upon appeal taken there unanimously dismissed the appeal.

The jury, without being asked questions, assigned as reason for their verdict that the engine was placed too near the chute by the defendant company. But, is there evidence that the company placed the engine thus needlessly and hence negligently?

The appellant is an incorporated company and the business in question was left entirely to the superintendent and a foreman.

The placing of the engine, which the respondent was in charge of as engineer, was their work. It was the result of experiments in the course of working at that chute, placed where complained of.

The company's business was that of loggers. In course of such business this chute, some fifteen hundred feet long, was used for sliding logs down to the water's edge.

The placing of this engine (needed for occasional service in connection therewith) one day at one point and next day at another, would hardly seem to constitute, as a matter of course, a part of a system adopted by the company. It may have, in the language of Lord Cairns in *Wilson v. Merry*, L. R. 1 H. L. Sc. 326, [19 L. T. N. S. (H. L. 1868), 13 Am. Neg. Cas. 693n], provided "adequate material and resources" for the protection of the workmen under such circum-

stances as to render the mistake of the competent superintendent only the act of a fellow employee, and not in this regard of the company.

An examination of the authorities when we had to dispose of *Ainslie Mining & Ry. Co. v. McDougall*, 42 Can. S. C. Rep. 420, relied upon by the Court of Appeal did not satisfy me that the accidental mistake of a competent superintendent or foreman if so supplied with adequate material and resources enabling him to do better, but failing through his negligence, could be attributed as a matter of course to the company.

It so happened in that case that there was evidence from which it might be inferred that the company did know and direct, or acquiesce in, what was done. It was not necessary to decide the point of the company's responsibility for negligence of a competent superintendent, supplied as suggested.

Is a company without knowing, or having the means of knowing, responsible in such a case for the negligence of the superintendent?

In the case at bar the failure to raise directly, at any stage, the point in question, when coupled with the general verdict given, seems to preclude, even if it had been taken here, as it was not, the consideration and passing opinion upon such a point.

I agree in the dismissal of the appeal.

I only refer to this question to guard myself from being taken, by tacit consent, as agreeing in the suggestion that the case cited conclusively decides the law as in the way apparently assumed in the judgment of my brother judges in that case.

A decision is binding only so far as necessary to the decision of the case.

With every respect for my brother judges, I do not think the decision carries the law further than it had previously gone in modifying the law laid down in *Wilson v. Merry*, L. R. 1 H. L. Sc. 326, 19 L. T. N. S. 30 (H. L. 1868), 13 Am. Neg. Cas. 693.

Yet it has been relied upon here and elsewhere as having done so.

DUFF, J. The finding of the jury whether treated as a general verdict or as a special verdict is in effect a finding that the arrangement of the works taken as a whole was faulty by reason of the fact that the engine was placed too near the chute. I agree with the learned judges of the Court of Appeal that there was evidence to sustain this view. The questions arising are, first, whether, in law, that is sufficient to cast a liability on the company, and, secondly, whether, on the undisputed facts, the proper conclusion is not that the proximate cause of the injury to the plaintiff was his own act in unnecessarily remaining in a place of danger.

This last contention was pressed upon us by Mr. Ewart with his usual ingenuity, but there appears to be evidence which, if believed by the jury, might properly lead to the inference that the plaintiff himself believed, on grounds not unreasonable, that it was his duty to be where he was. The plaintiff himself expressly states that it was his duty to be at the engine; and it was stated by another witness that he had been discharged from a similar position for not remaining at his post. In face of this evidence it cannot be successfully maintained, in the absence of a finding of the jury to that effect, that the plaintiff is disqualified from recovering by reason of contributory negligence. There is evidence again showing that the plaintiff called attention to the danger and asked for protection. This happened the day before the accident occurred. In these circumstances it cannot be said, as a matter of law, that the plaintiff voluntarily assumed the risk of injury arising from the position in which he was placed. In my view, therefore, this contention fails.

As to the first point, the employer is responsible according to the view of the majority of the judges in *Ainslie Mining & Ry. Co. v. McDougall*, 42 Can. S. C. R. 420, for the installation of a system of work which needlessly exposes his workmen to risk of injury.

I do not propose to re-state the grounds on which that opinion rests; they are sufficiently explained in the judgment of Mr. Justice Davies. In this case as I have said, the jury have, I think, in effect found all that is necessary to establish the proposition that the system inaugurated infringed this rule.

ANGLIN, J. The verdict returned in this case was, in my opinion, a general verdict. But whether it should be so regarded or should be deemed special findings, there was evidence to sustain it and it supports a judgment for the plaintiff at common law. The negligence found by the jury, if it should be regarded as based solely upon the placing of the engine, which it was the plaintiff's duty to attend, in a position unnecessarily dangerous, was a defect in original installation. If the verdict should be treated as resting upon the view that adequate protection was not provided for the safety of the plaintiff, while he was rightly and in the course of his employment in this dangerous place, it is a finding of a defective system. In either case the defendants are, in my opinion, liable at common law for the injuries sustained by their employee, the duty, of a breach of which the jury have found them to have been guilty, being a duty which they could not delegate so as to substitute liability under the "Employers' Liability Act" for liability at common law in event of injury resulting

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to an employee from failure to discharge it. Ainslie Mining & Ry.
Co. v. McDougall, 42 Can. S. C. R. 420.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

HERLITZKE v. LA CROSSE INTERURBAN TELEPHONE CO.

[SUPREME COURT OF WISCONSIN, FEBRUARY 21, 1911.]

145 Wis. 185.

1. Appeal—Verdict—Conclusiveness.

A verdict rendered in a negligence action supported by sufficient evidence is conclusive on appeal.

2. Telegraphs and Telephones—Wires—Inspection.

A telephone company must be reasonably vigilant in the inspection of its line, especially of portions which cross highways, to discover whether any of the wires sag so as to render the highway dangerous for travel.

3. Telegraphs and Telephones—Sagging Wires—Injuries.

In an action against a telephone company to recover damages for injuries sustained by one, the top of whose buggy was caught by a telephone wire hanging loosely across the highway, evidence held sufficient to warrant a finding of negligence on the part of the defendant.

4. Telegraphs and Telephones—Sagging Wires—Instructions to Jury.

In an action against a telephone company to recover damages for injuries to one caused by the top of her buggy being caught by a telephone wire hanging loosely across the highway, an instruction to the jury that before they could find the defendant guilty of negligence, they must be satisfied to a reasonable certainty from a preponderance of the evidence that the sagging of the pole line resulted from a defective condition thereof, which in the exercise of ordinary care the defendant should have remedied, and that the burden of proof was upon the plaintiff, correctly states the law.

5. Trial—Instructions Previously Given.

Error cannot be predicated upon the mere refusal of the trial court to give requested instructions which correctly state the law, if the same matter is embodied in substance in the general charge already given.

Appeal by defendant from a judgment of the Circuit Court of La Crosse County, rendered in favor of plaintiff, Julia Herlitzke, in an action brought to recover damages for injuries caused by coming into contact with a telephone wire loosely hanging over the highway. Affirmed.

For appellant—McConnell & Schweizer.

For respondent—J. E. Higbee.

NOTE.

On the subject of Liability for Injuries to Persons Driving Caused by

Vehicle Being Caught by Sagging Wires or Poles on Highway, see 6 Am. Neg. Rep. 629.

COMPLAINT.

The plaintiff above named, by J. E. Higbee, her attorney, complains of the above named defendant, and for cause of action respectfully shows to the court and alleges:

I. That the defendant is now and was at the time and times herein mentioned, a corporation duly organized and existing as such under and by virtue of the laws of the State of Wisconsin, and engaged in the business of building, owning, maintaining and operating interurban telephone lines and exchanges for the transmission and reception of messages by wire between cities and villages and points in the County of La Crosse, and State of Wisconsin, and other places.

II. That at the time herein mentioned, the defendant corporation owned and operated a toll telephone line between the village of West Salem, in the County of La Crosse, Wisconsin, to a point known as Mindoro, in La Crosse County, Wisconsin, and that the wires over which messages were transmitted by the defendant between said points were strung upon poles running along the side of and adjacent to a public highway, in the County of La Crosse and State of Wisconsin, which said highway extends from the village of West Salem, in a northerly direction to Mindoro, and crosses section thirty-three (33), township seventeen (17), north of range number six (6), in said county and State.

III. That at a point along the line of said highway, in said section, town and range, and at about the place of intersection of said highway with another highway from the south, and at a place where there is a bend in said highway, the wires of the defendant company were strung and erected diagonally across said public highway, and were strung between poles on the opposite sides of the travelled track of said highway.

IV. That the defendant had so negligently and carelessly constructed its telephone lines and wires at this point, and had so carelessly and negligently erected poles upon which said lines and wires were strung, and the poles erected by the defendant and upon which wires were strung were so unfit, rotten and decayed, and were negligently and carelessly permitted by the defendant to so become and remain that they were insufficient to hold the wires and lines strung thereon, and therefore the wires of the defendant company strung across said highway at said point sagged and hung down across the travelled track of said public highway at a distance of not more than three or four feet from the surface thereof; and said wires were carelessly and negligently permitted by the defendant so to lag and hang

across said public highway at said place at a distance of not more than three or four feet from the ground, and in such a position as to cause said wires to come in contact with vehicles passing over and across said public highway at that place, and in such a manner as to render said wire an obstruction to said highway, and dangerous to persons passing thereover.

V. That notwithstanding said dangerous condition, position and character of said wires, and their liability to cause injury and damage to travellers, the defendant carelessly and negligently permitted said wires to remain in such a dangerous position for an unreasonable length of time, and permitted said wires to hang across said highway at a height of not more than four feet from the surface thereof, without warning or signal of any kind whatsoever to warn travellers upon said highway of the condition of said wire, and of its dangerous character, and of the fact that there was an obstruction to said highway.

VI. That the defendant negligently and carelessly permitted the poles upon which it had strung wires along said public highway at the point hereinabove specified to become so rotten, decayed and insufficient that they were not sufficient to sustain the wires and withstand the strain of the wires strung upon said poles, and were improper for such purposes; and by reason of the great weight and strain upon the same, said poles were broken, permitting the wires strung thereon to hang down across the roadway within a few feet of the surface of the same, in such a manner as to cause said wires to come in contact with any vehicle or carriage passing thereover. That the defendant so permitted said wires to so hang across said public highway at the point above specified without any signal upon or near the same to indicate their presence to travellers upon said highway, or to warn travellers of the dangerous character of said obstruction.

VII. That upon the 3rd day of June, A. D. 1908, the plaintiff, not knowing of the existence of said wires, or the dangerous position of the same, and using due care on her part, was riding along said highway in a covered buggy drawn by a team of horses, and by reason of the negligence and carelessness of the defendant, as hereinabove set forth, when plaintiff reached the point in said highway where said wires crossed the same, the wires of the defendant company so hanging across the road in such dangerous position, became caught upon the top of the buggy wherein plaintiff was riding, whereby said buggy was overturned and the horse attached thereto became frightened and unmanageable thereat, and ran away, and the plaintiff was thereby

thrown violently to the ground, and dragged along with said buggy for a distance of several rods, thereby sustaining severe injuries to her person, in that she was badly bruised in and about the head, neck, arms, hips, and legs, and by reason thereof, she was rendered unconscious, and she then suffered a severe concussion of the brain, and thereafter, and as a direct result of the injury so sustained by her through the defendant's negligence and carelessness, plaintiff suffered from nervous shock and breakdown, and was rendered sick, sore and disabled, and unable to care for herself, and unable for a great length of time to perform her ordinary duties, and was obliged to expend large sums of money for medical care and attendance, and the mental and physical condition of the plaintiff is now, by reason of the injury so received by her greatly and permanently impaired, all to the plaintiff's damage in the sum of five thousand dollars (\$5,000).

That afterwards, and within a year of the date of said accident and the receipt of such injuries by the plaintiff, she caused to be served upon the defendant a notice in writing signed by herself, which said notice stated the time and place where said damage and injuries occurred, a brief description of said injuries, the manner in which they were received, and the grounds on which said claim is made, and that satisfaction thereof is claimed of the defendant.

Wherefore, the plaintiff demands judgment in her favor, and against the defendant, in the sum of five thousand dollars, together with the costs and disbursements of this action.

VINJE, J. The defendant earnestly contends that there is no evidence to sustain the finding of the jury that the low position of the telephone wire across the highway was due to any want of ordinary care on its part. Some distance south of the place of the accident the highway ran in a northerly direction with the telephone line on its west side. It then turned nearly west, making almost a right angle, the telephone post at which point will hereafter be designated as A, and ran in a westerly direction for about 500 feet, with the telephone line on the south side; then again in a northerly direction, making a little more than a right angle, the telephone at which point will be designated as C. At the point C the line crossed the road and continued on the east side thereof. The first pole east of C will be known as B, and the first pole north of C as D. From this it will appear that a line connecting B, C and D would form a triangle with the right angle at C, and that if the wire should become detached from C it would hang from B to D, and across the road east to where it would if hung from C to D. A short distance east of the point where the

wire hanging from B to D would cross the road is a bridge. Plaintiff was being driven in a westerly direction, and just beyond the bridge the wire caught the buggy and the injury occurred. The pole at the point A was guyed by a wire running across to the east side of the road, and defendant's theory, supported by evidence, was that this guy wire was struck by a heavy oak limb the night before causing the pole to straighten up and so produce a tension on the wire from A to C, breaking or pulling off the insulator at C and so allowing the wire to hang from B to D. The wire was not wound around the insulator, but tied thereto by a separate wire, thus allowing a stretching of the wire from A to C.

Plaintiff's theory, also supported by evidence, was that the pole C was so decayed and worn that it either broke off entirely or else bent to the east sufficiently to give enough slack to permit the wire to come within four or five feet of the ground where it crossed the highway. Defendant's manager testified that about three years before the accident he inspected the pole C and found it then somewhat decayed, about half an inch of rot. He put guy wires on it for the purpose of holding it in position. After that no inspection was made of the pole as to soundness or sufficiency up to the time of the injury. There was a conflict in the evidence as to whether or not it was then standing.

It is apparent from the above description of the line that the pole C was subjected to an unusual amount of strain, and that if the wire should become disconnected from it, or if the pole should be pulled out of position in the direction of the strain on it, the wire would in all probability interfere with and endanger public travel on the highway. There was evidence to show that some time after the injury occurred the pole was found lying on the ground near where it had stood, and that it was very rotten at the butt. One witness testified that: "When they sawed it off they broke off a lot of rotten places, and coming home in the machine some more were broken off. • • • It was weak like all rotten wood."

In view of the whole evidence, and taking into consideration the necessity for a strong pole at C and the testimony to the effect that it was somewhat rotten three years before the injury occurred, that it had not been inspected since, and the evidence as to the condition of the pole found there shortly afterwards, as well as the apparent peril to travel from any sagging of the wire where it crossed the highway, we cannot say that the jury were not warranted in finding negligence on the part of the defendant. It was its duty to be reasonably vigilant in the inspection of its line, and especially so at a place such

as the one in question, where the peril to travel resulting from a sagging of the wire was so obvious. It must be admitted that the theory of the defendant as to what caused the wire to sag was more or less plausible and supported by evidence; but it was peculiarly the province of the jury to determine, under the conflicting evidence, what was in fact the real cause of the injury. Plaintiff's theory was at least equally plausible, and, as we have said, supported by evidence sufficient to sustain the verdict. In such a situation the finding of the jury is conclusive. *Kortendick v. Waterford*, 135 Wis. 77, 115 N. W. 331.

Defendant assigns error because the court refused to give the following instruction in connection with question 1 of the special verdict: "You are not permitted to guess at your verdict in answering this question, nor in answering any other question in this verdict herein. Verdicts must be based on evidence, not on mere conjecture, and, unless you are satisfied to a reasonable certainty that the low position of the telephone wire across the highway at the time and place of the injury was due to a want of ordinary care on the part of the defendant company in constructing and maintaining its telephone line at the point in question, you are instructed to answer this question, 'No.' "

The court in its charge to the jury fully and fairly stated the defendant's theory of the case, and, in connection with its instruction on the first question of the special verdict, said: "You should bear in mind that it is not necessary for the defendant to prove that it exercised ordinary care. On the contrary, the duty rests entirely on the plaintiff to prove that it did not, and that its failure in that regard was the cause of the wire being in the fallen and dangerous condition, shown by the evidence at the time and place of the injury."

The jury were further instructed relative to this question that, before they could answer it in the affirmative, they must be satisfied to a reasonable certainty from a preponderance of the evidence that the falling and lowering of the pole resulted from a defective condition thereof, which, in the exercise of ordinary care, the defendant ought not to have permitted to exist; that the burden of proof was upon the plaintiff; and that the jury must answer the question in the negative unless convinced to a reasonable certainty by a preponderance of the evidence that it should be answered in the affirmative. While it is true that a portion of the charge quoted does not in express terms say that the jury cannot base their verdict upon mere conjecture, or that they are not permitted to guess, still we think the only reasonable inference that sensible men could draw from the charge given

was that they must base their verdict upon the testimony in the case, and that from such testimony they must be satisfied there was a want of ordinary care on the part of the defendant before the question could be answered in the affirmative. Trial courts are not required to adopt any particular phrasing of a rule of law given to the jury, and error cannot be predicated upon the mere refusal to give a requested charge which correctly states the law, if it is in fact embodied in substance in the general instructions given. *Jones v. Monson*, 137 Wis. 477, 488, 119 N. W. 179, 129 Am. St. Rep. 1082.

By the Court: Judgment affirmed.

HUGHES V. ATLANTA STEEL CO.

[SUPREME COURT OF GEORGIA, JUNE 13, 1911.]

136 Ga. 511.

1. Master and Servant—Violation of Law—Injuries—Negligence—Liability.

The collateral fact that the plaintiff and the defendant are engaged in violating the law does not prevent the former from recovering damages of the defendant for an injury negligently inflicted, unless the unlawful act contributed to produce the injury.

(a) A servant who is injured by the negligent conduct of an incompetent fellow servant, the incompetency being unknown to him, may recover from the common master damages arising from his breach of duty in knowingly employing and retaining the incompetent servant, where the proof shows that at the time of the injury the plaintiff, the negligent and incompetent fellow servant, and the master were all three engaged together in the violation of a penal statute of this State, viz., the statute making penal the pursuit of one's business or work of ordinary calling on the Lord's Day.

2. Negligence—Violation of Law—Injuries.

The ruling in *Wallace v. Cannon*, 38 Ga. 199, 14 Am. Neg. Cas. 120, 121, 95 Am. Dec. 385 (1868), *Martin v. Wallace*, 40 Ga. 52, and *Redd v. Muscogee R. Co.*, 48 Ga. 102, to the effect that when two or more parties engage in an act violative of a penal law, and one of them is injured by the carelessness or negligence of the other, the injured party is not entitled to damages, should be so qualified as to provide that, to defeat a recovery in such case, the violation of the statute must be a contributing cause of the injury.

[Headnotes by the Court.]

Appeal by both parties from a judgment of the Court of Appeals on a certified question of law in an action brought to recover damages for injuries sustained by a servant while violating the penal law. Question answered.

For plaintiff—Westmoreland Bros. and F. M. Hughes.

For defendant—Smith, Hammond & Smith.

CASE NOTE.**Liability of Master for Injury to Servant Sustained While Violating Penal Law.**

- I. SUNDAY LAW, 429-435.
- II. OTHER LAWS, 435-436.

In addition to the authorities set out by the court in its opinion in *HUGHES V. ATLANTA STEEL COMPANY*, (the case annotated), on the subject of the

master's liability for injuries sustained by his servant while violating penal law, the following cases are in point:

I. Sunday Law.

The fact that the servant was working for the master on Sunday cannot be said, according to the weight of authority, to be either in law or in fact contributory negligence on the part of the servant concurring to produce injury, nor the proximate cause

EVANS, P. J. The Court of Appeals has certified to us the following question of law: "Can a servant who was injured by the negligent conduct of an incompetent fellow servant, the incompetency being unknown to him, recover damages from a common master, arising from his breach of a duty in knowingly employing and retaining the incompetent servant, where the proof shows that at the time of the injury the plaintiff, the negligent and incompetent fellow servant, and the master were all three engaged in the violation of a penal statute of this State, viz., in pursuit of their business and work of ordinary calling on the Sabbath day? Penal Code, § 422."

One injured through the negligence of another ordinarily has the right of action against a tort-feasor. The query submitted by the Court of Appeals raises the question whether this right of action is lost because at the time of the happening of the tort the injured person was violating a penal law. In Massachusetts it was held that a plaintiff who gratuitously assisted the defendants in clearing out a wheel pit on the Sabbath, for the purpose of preventing the stoppage, on a week day, of the defendant's mills, could not recover for the defendant's negligence, by reason of the statute, making penal such work on the Sabbath day. The court based its decision on the premise that the plaintiff's act, working on the Lord's Day, was so inseparably connected with the cause of action as to prevent his maintaining a suit. *McGrath v. Merwin*, 112 Mass. 467, 17 Am. Rep. 119. In most jurisdictions, including the Supreme Court of United States and the courts of England, it is held that a collateral unlawful act, not contributing to the injury, will not bar a recovery. The mere fact that

of such injury. *Hoadley v. International Paper Co.*, 72 Vt. 79 (1899).

A right to recover damages for death of a brakeman employed by a railroad company, caused by the defective condition of appliances furnished by the company, will not be defeated because the injuries which produced death were sustained while he was laboring for the company in violation of the Sunday Law. The court said: "That a person, injured by the negligent omission of another to perform a legal duty, would not be denied a recovery, even though it appeared that the injured person was, at the time of receiving the injury, acting in disobedience to his collateral obligation to the

State, which required of him the observance of the Sunday Law. If the railway company violated its duty by furnishing machinery and appliances which it knew were defective, the danger to an employee who was required to use the appliances, in ignorance of their defective condition, was the same on one day as on another. That they were being used on Sunday, rather than on Monday, neither contributed to, nor was it the efficient cause of, the injury which gave rise to this action, nor can the railroad company now interpose and become the champion of the Sunday Law as an excuse for its wrong, or to defeat a recovery * * *. It is quite true that a plaintiff will

the plaintiff on the one hand, or the defendant on the other, was engaged in violating the law in a given particular. at the time of the happening of the accident, will not bar the right of action of the former, nor make the latter liable to pay damages, unless such violation of law was the efficient cause of the injury. 1 *Thomp. Neg.* § 82, 249; 37 *Cyc.* 573; *P., W. & B. Co. v. P. & H. Steam Towboat Co.*, 23 *How.* 209, 16 *L. Ed.* 433; *Black v. City of Lewiston*, 2 *Idaho (Hasb.)* 276, 13 *Pac.* 80; *Knowlton v. Railway Co.*, 59 *Wis.* 278, 18 *N. W.* 17; *Osaphe v. Judd*, 30 *Minn.* 126, 14 *N. W.* 575; *Sharpe v. Evergreen*, 67 *Mich.* 443, 35 *N. W.* 67; *Bigelow v. Reed*, 51 *Me.* 325, 15 *Am. Neg. Cas.* 304n; *Mohoney v. Cook*, 26 *Pa.* 342, 67 *Am. Dec.* 419; *Ill. Central R. Co. v. Dick*, 91 *Ky.* 434, 15 *S. W.* 665; *Baldwin v. Barney*, 12 *R. I.* 392, 34 *Am. Rep.* 670; *Western Union Tel. Co. v. McLaurin*, 70 *Miss.* 26, 13 *South.* 36. As said by Judge Cooley: "The principle is that, to deprive a party of redress because of his own illegal conduct, the illegality must have contributed to the injury." 1 *Cooley on Torts* (3rd Ed.) 269. The statute denouncing as penal the following of one's ordinary calling on the Lord's Day defines and declares a duty to the State. A breach of duty to the State does not necessarily involve a breach of duty to the defendant in such cases; and when it does not, it is simply an irrelevant fact, unless the law gives it relevancy in some express form. Hence the conclusion is irresistible that the plaintiff's violation of a penal statute cannot be pleaded in defense of a tort, unless such violation is a contributing cause of the injury for which compensation is asked.

in no case be permitted to recover when it is necessary for him to prove his own illegal act or contract as a part of his cause of action, or when the essential element of his cause of action is his own violation of law * *. But where he can prove his cause of action without proving that he was violating the law, even though it appears incidentally that he was at the time acting in disobedience of some statute, unless his illegal act was the efficient or proximate cause of the injury complained of, or unless the illegal act or contract is the foundation of his action, a recovery may be sustained nevertheless * *. The gist of the action in the present case is the negligent failure of the railway company to

furnish safe and suitable appliances whereby the death of the plaintiff's intestate was wrongfully caused while he was in the company's service as a brakeman. The contract of employment, and the time when the injury occurred, were mere incidents to, and were in no respect the foundation of, the action." *Louisville, N. A. & C. R. Co. v. Buck*, 116 *Ind.* 566, 14 *Am. Neg. Cas.* 553n (1888).

In a New York case it was held that the fact that a servant was laboring on Sunday in violation of the Penal Code, when he was injured by the breaking down of a scaffold, will not preclude a recovery by him for injuries so sustained. *Solarz v. Manhattan R. Co.*, 8 *Misc.* 656, 29 *N. Y. Supp.*

But it is contended that, where both plaintiff and defendant are engaged in violating a penal statute when the former is negligently injured by the latter, the rule should be different from that applied to cases where the plaintiff alone was committing an illegal act at the time of his injury. In support of this contention the cases of *Wallace v. Cannon*, 38 Ga. 199, 14 Am. Neg. Cas. 120, 121, 95 Am. Dec. 385; *Martin v. Wallace*, 40 Ga. 52, and *Reed v. Muscogee R. Co.*, 48 Ga. 102, are cited. These decisions rule that when two or more parties are engaged in the same illegal transaction, in violation of the supreme law of the land, and one of them is injured by the carelessness or negligence of the other, the court will not lend its assistance in favor of either party to recover damages. Is this ruling decisive of the question of law submitted; and, if so, are those cases so wrong in principle that they should be reviewed and modified, a request to review these cases having been made? Each of these cases arose during the late war between the States, and the alleged illegality consisted in the transportation of troops in aid of the Confederate government and in opposition to the government of the United States. In the *Cannon Case*, Cannon was the engineer of the train which carried Confederate soldiers and munitions of war in addition to passengers, and was killed in collision with another train of the defendant on its return trip after having transported Confederate soldiers to their destination. In none of the cases did the court discuss or recognize the principle that the plaintiff would be cut off from recovery because of his own illegal conduct, unless its illegality contributed to the in-

1123 (1894), *aff'd* 11 Misc. 715, 32 N. Y. Supp. 1149, mem. The court said: "It is clear that the violation of these penal provisions had nothing whatever to do with the injury to the plaintiff, for it would have happened to him any other day, under similar conditions. It was not the day, but the neglect of the defendant, which caused the damage. A party violating the law is not on that account put at the mercy of others. He may not be able to recover for services rendered on the faith of the contract; but he is not for that reason to be physically disabled. In other words, the defendant, in order to escape from liability for its negligence, cannot plead a violation of the Sunday Law which it invited. * * * If

the plaintiff had to recover 'through the medium and by aid of an illegal transaction, to which he was himself a party,' there might be some force to the defense's contention, but this is not so, for the defendant is liable to plaintiff for the safety of the scaffold, independent of the contractual relations between them."

And in *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 14 Am. Neg. Cas. 541n (1886), it was held that the mere fact that a brakeman sustained injury while attempting to couple cars in pursuance to orders from the conductor of the train, without having been properly instructed in regard to doing such work, was acting in disobedience of the Sunday Law of the

jury. Should the ruling be modified to this extent? At the outset we venture to say that no rational differentiation can be made between cases in which it is held that the plaintiff may recover for a tort inflicted while he alone was violating the Sunday law, and cases where both he and the tort-feasor were simultaneously violating the Sunday statute, where in neither instance the violation of the statute did not contribute to the injury. If a carpenter undertakes to repair his house on Sunday, and negligently lets fall a piece of timber, which injures his neighbor, a gardener, while working in his garden, can it be said that the gardener shall go without redress because he was following his ordinary vocation on the Lord's Day? In the case hypothesized there can be no causal connection between the carpenter's negligence and the gardener's work on Sunday. The occurrence would have happened on any other day under similar circumstances. It would be offering a premium upon negligence to hold that if two persons are engaged in violating the Sunday law, and one should negligently injure the other, he could escape liability when the violation of the law was not a contributing cause of the injury. In effect it would be to allow an independent public offense to be set off against a private wrong. It was held in *Gross v. Miller*, 93 Iowa, 72, 61 N. W. 385, 26 L. R. A. 605, that the mere fact that both parties were violating the Sunday law by hunting on that day will not prevent one of them from recovering from the other for injuries caused by the negligent discharge of a revolver by the other. In the course of demonstrating the proposition the court said: "If one violates the

State, will not bar a recovery from the company, where the latter's negligent act was the proximate cause of the injury. The court said: "The contract in pursuance of which the plaintiff engaged in appellant's service was not made on Sunday, nor was it to be performed on that day. It was therefore neither illegal in its inception nor was it an engagement to do an unlawful act. Besides, there was no relation, near or remote, between the violation of the Sunday Law and the injury complained of. That the plaintiff may have been violating his obligation as a citizen to the State cannot be set off against the appellant's failure of duty in requiring an extraordinary and hazardous service from

an inexperienced employee, without giving him warning of the peril attending the service required."

The fact that an accident occurred through the negligence of the railroad company to one employed as a laborer on the track on Sunday, was held in *Johnson v. Missouri Pac. R. Co.*, 18 Neb. 690 (1886), not to exonerate the railroad company from liability where the company found it necessary to operate its trains on that day and also found it necessary for its employees to labor on that day to keep its tracks in proper order and repair for use of such trains. The court said: "If railway companies assume to decide what trains are necessary, and in the exercise of that right find

Sunday law, he is amenable to the State—is subject to the punishment inflicted by the statute. We cannot see, upon principle, why the mere act of violating such a law should in any case be held a contributing cause to the injury, if one follows. If the boys had not gone to the woods, the accident would not have happened; and the same is true if they had not been in existence. So far as the pleadings show, there is nothing surrounding the accident that was in any way peculiar to the day upon which it happened. It was not more likely to happen upon Sunday than on any other day. It was not a necessary, or even, we think, a probable, result of the violation of the law.” The fact that a party injured was at that time violating the law does not put him out of the protection of the law. The law should not absolve from responsibility the perpetrator of a private wrong, solely because the injured person may have violated a penal law, which violation in no-wise contributed to his injury.

Again, the argument is advanced that the rule that a person violating the Sunday law is not precluded from recovering damages for injuries received from the negligence of another is not applicable where the parties sustain the relation of master and servant, for the reason that it is a necessary part of the injured servant’s case to prove the contract, and a contract to labor on the Sabbath is void; that without the contract no legal duty of the master to employ competent fellow servants is shown. It may be admitted that the test whether a demand connected with an illegal transaction is capable of being enforced by law is whether the plaintiff requires the aid of the illegal transaction

it necessary to run construction and material trains, as shown by the testimony of their engineer, and for the purpose of enabling them to do so, require the labor of their track men to keep the track in a passable condition, it would require a stretch of imagination and a severe twisting of legal principles to hold that under such circumstances they would not be liable for negligence resulting to an employee engaged in what was thus held to be a work of necessity.”

In *Taylor v. Star Coal Co.*, 110 Iowa, 40 (1899), it was held that the fact that a miner was working in a mine on Sunday, in violation of the penal law, will not defeat his right to recover for injuries due to the fall of a part

of the roof of the mine in which he was working.

In *Houston & T. C. R. Co. v. Rider*, 62 Tex. 267 (1884), it was held that persons who are fellow servants of a master do not cease to be such because the work on which they were employed at the time of the injury was being done on the Sabbath Day in violation of the penal law.

The doctrine announced by the decisions of the courts of Massachusetts is not in accord with the consensus of opinion on the right to recover for injuries sustained while violating the Sunday Law; the decisions depend much on the peculiar legislation and customs prevailing in that commonwealth.

A conductor of a street car violates

to establish his case. This comes from the universally accepted principle of public policy that no court will lend its aid to a party who grounds his action upon an immoral or an illegal act. In the case submitted by the Court of Appeals the action is founded on a breach of duty, which the law imposes as an incident to the relation of master and servant. The master's duty under the law is to exercise due care in the selection of servants, and not to retain them after knowledge of incompetency. The terms of the contract of the master with his incompetent servant are of no relevancy to the plaintiff's case. The relevant fact is that the master had put the incompetent servant to work with the injured servant as a fellow servant. Nor is the injured servant, in making out a *prima facie* case, required to prove more than that he was at work for the master, subject to the latter's orders and control, and liable to be discharged by him for disobedience of orders or misconduct. *Brown v. Smith*, 86 Ga. 274, 14 Am. Neg. Cas. 80, 12 S. E. 411, 22 Am. St. Rep. 456. A servant who is required to report for work on Sunday, and while working on that day is injured, may not be able to recover for services rendered on the faith of the contract;

the Sunday Law by performing the ordinary duties of his employment on Sunday, and thereby will not be permitted to recover for injuries sustained by being struck by a car of another company passing on a parallel track as he was standing on the steps of the car of which he had charge, since his illegal acts necessarily contributed to his injury. *Day v. Highland St. Ry. Co.*, 135 Mass. 113, 46 Am. Rep. 447 (1883).

A locomotive engineer who, in the performance of the ordinary duties of his employment on Sunday, violates Massachusetts Pub. Stat. c. 98, section 2, relating to working on Sunday, cannot recover for injuries caused by a defect in the railroad track, on the ground that he was engaged in violation of law at the time of his injury, and that the work he was performing was not one of necessity or charity within the meaning of the statute. *Read v. Boston & A. R. Co.*, 140 Mass. 199 (1885). In this case it appeared that the statute declaring that the provisions of the public statutes relating to

the observance of the Lord's Day shall not constitute a defense to an action for a tort or injury suffered by a person on that day was enacted subsequently to the injury complained of.

II. Other Laws.

It has been held that an action will not lie in behalf of one who bases his claim, in whole or in part, on the violation by himself of the criminal or penal laws of the State, and this principle is not impaired by reason of the fact that the plaintiff was acting under the orders of the defendant who was his principal or master, since the servant or agent cannot justify such conduct by showing that he was under another. Thus, in *Lloyd v. North Carolina R. Co.*, 151 N. C. 536 (1909), it was held that a recovery by an employee of a railroad company for injuries sustained while attempting to board a moving train on which he was employed, is barred by the employee's violation of North Carolina Pub. Laws, chap. 456, which declares

but he is not for that reason to be physically disabled by a negligent master, and denied a recovery for his injury solely because the injury happened while he and his master were working on Sunday. *Solarz v. Manhattan Ry. Co.*, 8 Misc. Rep. 656, 29 N. Y. Supp. 1123; *Louisville, N. A. & C. Ry. Co. v. Frawley*, 110 Ind. 18, 14 Am. Neg. Cas. 541n, 9 N. E. 594; *Taylor v. Star Coal Co.*, 110 Iowa, 40, 81 N. W. 249; *Johnson v. Missouri Pac. Ry. Co.*, 18 Neb. 690, 26 N. W. 347. Persons who are fellow servants of a master do not cease to be such because the work on which they were being employed at the time of the injury was being done on the Sabbath and the work was in violation of the Sunday law. *Houston & T. C. Ry. Co. v. Rider*, 62 Tex. 267. An employee of an industrial corporation is engaged in the primary work of earning his wage, and ought not to be placed at the master's mercy because the master conducts his work on Sunday as well as weekdays. A compositor in a printing office, who sets the type from which a criminal libel is printed by his master, ought not to be denied a recovery for an injury sustained by him from the master's negligence while engaged in setting the type. The true rule is that a master who negligently injures his servants while working on the Lord's Day is liable to the injured servant, notwithstanding that

it to be a misdemeanor on the part of employees of a railroad company to work more than 16 consecutive hours. The court said: "While the well being of the railroad employees was, no doubt, one of the motives which induced this legislation, the statute was also enacted for the benefit and protection of the public. And the principle just referred to, stated as one of the exceptions to the general rule, has no application to the case presented here, when the claimant must allege his own violation of the criminal law as the basis of his claim."

A locomotive engineer who, when intoxicated, was injured in attempting to mount the steps of his engine, in violation of a statute which provides that "if any person shall, while in charge of a locomotive engine running upon the railroad of any such corporation, * * * be intoxicated, he shall be guilty of a misdemeanor," cannot recover damages for the injury so sustained.

Seaboard Air-Line Ry. v. Chapman, 4 Ga. App. 706 (1908).

But a statute which makes it a misdemeanor for any miner to neglect or refuse securely to prop or support the roofs of mines under his control, will not bar a recovery by a miner who is injured by the falling of the roof of a mine in which he was working, in absence of evidence showing that he had control over the roof. *Taylor v. Star Coal Co.*, 110 Iowa, 40 (1899).

The right of an employee of a railroad company to recover for injuries caused by a train which was running at a rate of speed prohibited by law, will not be defeated on the ground that the train was in charge of co-employees of the servant injured, where such employees were operating the train pursuant to a time card prepared and promulgated by the company. *Blue-dorn v. Missouri Pac. R. Co.*, 108 Mo. 439, 32 Am St. Rep. 615 (1891).

at the time of the injury both may have been violating the Sunday law.

We therefore think that the ruling in the cases of *Wallace v. Cannon*, 38 Ga. 199, 14 Am. Neg. Cas. 120, 121, 95 Am. Dec. 385, *Martin v. Wallace*, 40 Ga. 52, and *Redd v. Muscogee R. Co.*, 48 Ga. 102, that where two or more persons are engaged in the same transaction, which is in violation of a penal statute, and one of them is injured by the carelessness or negligence of the other, the injured person is without remedy, should be modified, with the qualification that, to prevent a recovery, the violation of the penal statute must be a contributing cause of the injury. All the Justices concur.

TAYLOR, Adm'r v. PROTESTANT HOSPITAL ASSOCIATION.

[SUPREME COURT OF OHIO, NOVEMBER 21, 1911.]

85 Ohio St. 90.

1. Hospitals—Charity—Injury to Patient—Liability.

The fact that a public charitable hospital receives pay from a patient for lodging and care does not affect its character as a "charitable institution," nor its rights or liabilities as such in relation to such a patient.

2. Hospitals—Public—Injury to Patient—Liability.

A public charitable hospital, organized as such and open to all persons, although conducted under private management, is not liable for injuries to a patient of the hospital, resulting from the negligence of a nurse employed by it.

[Headnotes by the Court.]

In error to the Circuit Court of Franklin County to review a judgment rendered in favor of defendant, in an action brought to recover damages for death caused by the negligence of a nurse employed by a charitable hospital association. Affirmed.

For plaintiff in error—Ulric Sloane.

For defendant in error—Pugh & Pugh.

PETITION.

The plaintiff respectfully represents to this court, and avers that on August 2nd, A. D. 1899, Nancy M. Taylor, late of Fairfield County, Ohio, departed this life intestate, and thereafter such proceedings were had that on the 25th day of September, 1899, by the consideration of the Probate Court of Fairfield County, Ohio, Charles E. Taylor, was appointed Administrator of the estate of Nancy M. Taylor, deceased, and thereupon accepted said trust and duly qualified, and ever since continuously has been, and now is the duly appointed, legally qualified and acting administrator of the estate of Nancy M. Taylor, deceased.

The said Nancy M. Taylor left surviving her as her widower and next of kin William B. Taylor, her widower, and Charles E. Taylor,

NOTE.

On the subject of Liability for Malpractice, see note in 21 Am. Neg. Rep. 331.

And see *Atkinson v. American School of Osteopathy* (Mo.), reported in this volume of *Negligence and Compensation Cases Annotated* (1 N. O. C. A.) p. 275, *ante*.

John C. Taylor, Clinton A. Taylor and Maggie J. Taylor, her children, and this action is brought for their benefit.

The defendant is and was at all of the times hereinafter mentioned a corporation, duly organized, incorporated and existing under and by virtue of the laws of the State of Ohio, and at all of said times was maintaining and operating a hospital at the city of Columbus, Ohio, for hire and reward.

On the — day of May, 1899, the defendant received the said decedent, Nancy M. Taylor, at its hospital as a pay patient, and it agreed, for a valuable consideration, to furnish her with board, lodging and nursing and to provide an operating room and operating table and to assist in and about a certain operation, which was to be performed and which was performed upon her on May 25th, 1899, by a certain surgeon, to wit, James F. Baldwin, upon the operating table in said operating room, so provided by said defendant.

The defendant provided for said operation certain gauze sponges, which were necessary to be used in and about said operation, which consisted of two abdominal incisions; and the said defendant also provided to assist in said operation one of its employees, to-wit, a nurse, whose duty it was to keep count of the sponges, so provided, as aforesaid, by the defendant, for such use by the surgeon, and at the close of the said operation to count said sponges and inform the surgeon whether or not all of the sponges, furnished by the said defendant, as aforesaid, were in her possession and accounted for; it being the uniform practice of such nurse at such operations, at said hospital, to keep such count, and give such information to said surgeon, so as to prevent any sponges being left in the body of the patient, said sponges being small, easily lost, difficult to find, and it being the practice at said time, at said hospital, and it being the custom and practice in hospitals generally throughout the country, for the purpose of avoiding a miscount of sponges, for the surgeon to inquire of such nurse as to said count, and to rely upon her count and to close up the incision, when assured by her that all of said sponges were accounted for and in her possession.

The plaintiff says that the said nurse so provided by the defendant for said operation upon decedent, carelessly and negligently failed to keep a correct count of said sponges, and carelessly and negligently informed the said surgeon, upon his inquiry, that all of said sponges were accounted for and in her possession, and carelessly and negligently failed to notify him to the contrary, when he sewed up said incisions, although one of said sponges had not been removed by said surgeon, and was not accounted for and in her possession, as by

the exercise of ordinary care she could have known, so that said surgeon relying upon her assurance that all of said sponges were accounted for and in her possession, and believing the said assurance to be true and correct, closed said incision, leaving one of said sponges in the body of said decedent, which said sponge produced a state of sepsis, and caused the death of said decedent on August 2nd, 1899, to the great damage of the plaintiff and next of kin in the sum of Ten Thousand (\$10,000) Dollars.

Wherefore, plaintiff prays judgment against the defendant for the sum of Ten Thousand (\$10,000) Dollars and costs.

ANSWER.

FIRST DEFENSE: For its answer to the amended petition filed herein, defendant admits that on August 2, A. D. 1899, Nancy M. Taylor, late of Fairfield County, Ohio, departed this life intestate, and that thereafter Charles E. Taylor was duly appointed and qualified and is now acting as administrator of the estate of the said Nancy M. Taylor, deceased, as is set forth in the amended petition.

Defendant further admits that it is, and was at all the times mentioned in said amended petition, a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of Ohio, and is, and was, maintaining and operating a hospital in the City of Columbus, Ohio, at all of said times.

Defendant says that it is true that on the 25th day of May, 1899, the said Nancy M. Taylor was received at its hospital as a pay patient, and that said hospital agreed, for a valuable consideration, to-wit, the sum of ten dollars (\$10) per week, to furnish the said Nancy M. Taylor with board and nursing.

Defendant further says that an operation was performed upon the said Nancy M. Taylor at its said hospital, on the 25th day of May, 1899, by a certain surgeon, to-wit, James F. Baldwin.

Defendant says that it is true that it provided for said operation certain gauze sponges, and also provided one of its employees, to-wit, a nurse, to assist in said operation.

Defendant further says that it denies each and every other allegation in the amended petition contained, except that which is herein specifically admitted or denied.

SECOND DEFENSE: For the second defense to the amended petition filed herein, defendant admits that on August 2, A. D. 1899, Nancy M. Taylor, late of Fairfield County, Ohio, departed this life intestate; and that thereafter Charles E. Taylor was duly appointed and qualified,

and is now acting as the administrator of the estate of the said Nancy M. Taylor, deceased, as is set forth in said amended petition.

Defendant says that it is now, and has been ever since it was organized, a public and charitable corporation; that it was incorporated and organized, and has been operated, exclusively for the purpose of providing hospital accommodations for the sick and injured; and that it never has had, has not now, and cannot have, any capital stock; that it never has declared, and cannot declare, dividends; and that it never made, and cannot make, any profits, either for the corporation or for its members; that its funds and income have always been, and will continue to be, derived from the rents, donations, devises and bequests, moneys and supplies from, and by, benevolent persons; that such funds and income have been heretofore used for the erection, support and maintenance of a public and charitable hospital for the sick and injured, and they will have to be used in the future for the improvement of said hospital, and the support and maintenance of the sick and injured therein lodged; that the persons who have heretofore made such donations, grants, devises, bequests and subscriptions, are so numerous that they could not be stated in this pleading.

Defendant further says that said hospital has always been, and is now, open to all persons who apply for its benefits and accommodations, as long as it has rooms to accommodate them.

That it has had, and now has, rooms which are for the occupation of patients who are gratuitously lodged and cared for, and it has had, and now has a number of rooms for those who are able to and willing to pay for lodging and care a reasonable compensation, and the income so received from pay patients has always been used to support and maintain the said hospital.

Defendant further says that the said Nancy M. Taylor engaged and agreed to pay this defendant ten (\$10) dollars per week for her boarding and nursing during the time she was at the hospital. She occupied a room, and was furnished board and nursing from the 25th day of May, until the 30th day of June, 1899, for which she paid the hospital the sum of \$51.40. That such sum so paid to this defendant was wholly inadequate as compensation for the board and nursing so furnished to the said Nancy M. Taylor.

Wherefore, this defendant prays to be hence dismissed, with its costs in this behalf expended.

REPLY.

Plaintiff for reply to the second defense set out in the answer of the defendant herein says:

That he has no knowledge and is not advised, except from the allegations of the said second defense, as to whether defendant is a public and charitable corporation; that it was incorporated and organized, and has been operated exclusively for the purpose of providing hospital accommodations to the sick and injured, and that it never has had, is not now, and cannot have any capital stock; that it never has declared and can not declare dividends; and that it never made and cannot make any profits either for the corporation or its members; that its funds and income have always been and will continue to be derived from the rents, donations, devises, and bequests, moneys, and supplies from and by benevolent persons; that such funds and income have been heretofore used for the erection, support, and maintenance of a public and charitable hospital for the sick and injured, and will have to be used in the future for the improvement of said hospital and the support and maintenance of the sick and injured therein lodged; that the persons who have heretofore made such donations, devises, bequests and subscriptions are so numerous that they can not be stated in this pleading; and he therefore denies each and every allegation of said second defense of defendant's answer in reference thereto.

Plaintiff further replying, says, that he has no knowledge and is not advised, except from the allegations of the said answer, as to whether defendant's said hospital has always been and is now open to all persons who apply for its benefits and accommodations as long as it has rooms to accommodate them; and therefore denies said allegations of said second defense.

Plaintiff further replying says, that he has no knowledge and is not advised, except from the allegations of said answer, as to whether the defendant has had and now has six wards which will accommodate forty-five patients, and which are for the occupations of patients who are gratuitously lodged and cared for, and that it has had and now has forty-five rooms for those who are able to and willing to pay for lodging and care a reasonable compensation, and that the income so received from pay patients has always been used to support and maintain said hospital; and therefore denies each and every allegation of defendant's second defense in said answer in reference thereto.

Plaintiff admits that defendant derives an income from the pay of patients treated and cared for at its said hospital.

Further replying, plaintiff denies that the sum paid by the said Nancy M. Taylor was wholly inadequate as compensation for the board and nursing so furnished to the said Nancy M. Taylor.

And with the exception of the admissions in said answer of matters

alleged in plaintiff's amended petition and of the facts hereinbefore expressly admitted, the plaintiff denies each and every allegation in defendant's second defense in its said answer contained.

JOHNSON, J. The question presented by the demurrer to the second defense of the answer is whether, under the facts set out in that defense, the defendant is liable for the negligence of the nurse in leaving the sponge in the body of the deceased. More definitely: Do the averments that the defendant is a public and charitable corporation, engaged in operating, maintaining, and supporting a public charitable hospital in the manner and for the purposes set forth, exempt defendant from liability for the negligence of the nurse in connection with the operation on the decedent at the time she was a pay patient of the hospital? This question has been decided in some other jurisdictions, and counsel have rendered valuable assistance by able and exhaustive briefs.

Defendant contends that the judgments of the courts below may be sustained on all or any of the several grounds, the first of which is that, being a charitable corporation operating a charitable hospital, it was not liable for the negligence of its employees, if such employees were selected with reasonable care. The position of plaintiff is that the doctrine of *respondeat superior* applies, and should be enforced, notwithstanding the character of the corporation or the nature of its undertakings, and that, having accepted deceased as a pay patient, a contractual relation existed between the parties, which imposed obligations on the defendant different from those to one who did not sustain such relation. Section 3240, Revised Statutes, provides for the election of trustees of a corporation, such as defendant, and § 3261, Revised Statutes, provides that the trustees of a corporation, created other than for profit, shall be personally liable for all debts of the corporation contracted by them.

'There is a direct allegation in the answer in this case that defendant is a public and charitable corporation maintaining a public and charitable hospital. We think this hospital, owned and operated in the manner set out, is a public charity, and this without reference to whether some of the patients are what are termed pay patients or not.

In *Gerke v. Purcell*, 25 Ohio St. 229, the court declares: "The fact that the use of property is free is not a necessary element in determining whether the use is public or not. If the use is of such a nature as concerns the public, and the right to its enjoyment is open to the public upon equal terms, the use will be public, whether a compensation be exacted or not."

In *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, the corporation, from the description of its objects and the manner of its creation and operation, was similar to the defendant in this case. The court says in deciding the case: "The fact that its funds are supplemented by such amounts as it may receive from those who are able to pay wholly or entirely for the accommodation they receive does not render it the less a public charity. All sums thus obtained are held upon the same trust as those which are the gifts of pure benevolence. * * * If, however, any contract can be inferred from the relation of the parties, it can only be on the part of the corporation that it shall use due and reasonable care in the selection of its agents. * * * The liability of the defendant corporation can extend no further than this: If there has been no neglect on the part of those who administered the trust and control its management, and if due care has been used by them in the selection of their inferior agents, even if injury has occurred by the negligence of such agents, it cannot be made responsible. The funds intrusted to it are not to be diminished by any such casualties, if those immediately controlling them have done their true duty in reference to those who have sought to obtain the benefit of them."

In *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224, the court state that the only question was the liability of the defendant for the negligent conduct of physicians and nurses employed by it, and in the selection of whom it has exercised due care. In this case there is a very full discussion of English and American cases touching the question, and the conclusion arrived at was that the hospital corporation was not liable, on grounds of public policy, for injuries caused by personal neglect of duty by a servant whom it has selected with due care.

The plaintiff, in *Powers v. Mass. Homeopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372, was a pay patient, and was injured by the negligence of a nurse in placing a rubber bag full of hot water against her side, burning her. Her counsel contended, as counsel for plaintiff in this case contend, that, she being a pay patient, the hospital was liable, because she was not the recipient of their charity; but the court denied the relief, and say: "In our opinion, a paying patient in the defendant hospital, as well as a nonpaying patient seeks and receives the services of a public charity."

Liability to a pay patient was denied in *Downes v. Harper Hospital*, 101 Mich. 555, 60 N. W. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427, and one of the grounds on which the court puts its decision was that decedent, having accepted the benefit of the charity, did so on

the understanding that the fund could not be diverted by the torts of the managers of the fund or their employees. The court say: "The fact that patients who are able to pay are required to do so does not deprive the defendant of its eleemosynary character, nor permit a recovery on account of the existence of the contract relations."

Other cases in which the same conclusion was arrived at, some of the courts adopting a somewhat different line of reasoning, are: *Farigan v. Pevear*, 193 Mass. 147, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484; *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745; *Union Pac. Ry. Co. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581.

Judge Stewart, in his excellent work on Legal Medicine (§ 96), after an examination of the cases on the subject, says: "The doctrine of the Massachusetts cases may be said to be the law followed by other States, and is the proper legal view to take of this question; the reasoning of the court being so sound as to seem irrefutable."

Counsel for plaintiff suggests that some of the American cases are predicated on the English case of *Holliday v. Vestry of St. Leonard's*, 11 C. B. (N. S.) 192, and some other cases, which, he insists have been impliedly repudiated by the later case of *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, which enforced the doctrine of *respondeat superior*.

We think this contention is not sound, because the company in the latter case was a trading company, and not a public charity in the sense that defendant here and similar corporations are. Mr. Justice Blackburn, who gave opinions in the cases referred to, said, in *Docks v. Cameron*, 11 H. L. 465: "Whatever may be the law as to exemption of property occupied for charitable purposes, it is clear that the docks in question come within no such exemption."

But even if it appears that the greater weight of authority outside of Ohio falls against his view, counsel for plaintiff insists that such authority is not in harmony with the established doctrine in this State, and refers to the cases of *Smith v. Cincinnati*, 4 Ohio, 500-514; *Dayton v. Pease*, 4 Ohio St. 80; *Dunn v. Agricultural Society*, 46 Ohio St. 96, 18 N. E. 496, 1 L. R. A. 754, 15 Am. St. Rep. 556; *Toledo v. Cone*, 41 Ohio St. 149; *Murphy, Adm'r v. Holbrook*, 20 Ohio St. 137, 5 Am. Rep. 633.

We do not think these cases sustain plaintiff's view of the question made by this answer. *Smith v. Cincinnati*, *Dayton v. Pease*, and *Toledo v. Cone*, *supra*, were cases in which the injury was done by the employees of the cities, in the performance of public works undertaken for the benefit of the cities, and in the exercise of powers and duties granted and imposed on them as municipal corporations. Of

course, under familiar rules, they were liable for the wrongful acts of their servants."

In *Dunn v. Agricultural Society*, *supra*, the fair grounds were kept and the fair conducted as a thing free to the public. Judge Williams, in declaring the judgment of the court says, as to the rule of exemption from liability, that "it has no application to corporations called into being by the voluntary action of the individuals forming them for their own advantage, convenience, or pleasure."

In *Murphy v. Holbrook*, *supra*, the receivers of a railroad company were held liable for injuries to plaintiff's intestate, and it was held to be "no defense in such action that the receiver was a public officer, or that he was an agent or trustee." But the receivers of a railroad company or other corporation hold the property in trust for the benefit of the company and its creditors, and when operated by the receivers under order of the court the object is to preserve the property and, if possible, earn something for the benefit of the company and its creditors. It is not an enterprise to serve and benefit the public solely.

There is disclosed in some of the cases and in the argument for defendant a singular disposition to question the fundamental soundness of the doctrine of *respondeat superior*. We are not disposed to lend support to such tendency. Experience has shown that the ends of justice are best secured by holding the master responsible for injuries caused by the wrongful acts of his servants, done in the prosecution of its private ends and for his benefit.

Doubtless the rule will be extended to meet the requirements of manifold new conditions brought about by growth and advance. Courts are constantly confronted with the necessity of extending established principles to new conditions. But in this case it is sought to extend the rule to masters different from others, and who do not come within its reason, and to hold a public charity involving no private profit responsible for the negligence of servants employed solely for a public use and a public benefit. We think such extension is not justified. Public policy should and does encourage enterprises with the aims and purposes of defendant, and requires that they would be exempted from the operation of the rule.

We think there is no error in the record, and the judgments of the courts below are affirmed.

Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE and DONAHUE, JJ., concur.

MILLER v. ATLANTIC COAST LINE RAILROAD CO. et al.

[SUPREME COURT OF SOUTH CAROLINA, DECEMBER 21, 1911.]

— S. C. —, 73 S. E. 71.

1. Master and Servant—Injured Servant—Acceptance of Benefits—Railroad Relief Department—Statute—Repeal.

The Act of Feb. 23, 1903, known as 24 Stat. at Large, p. 79, which provides that the acceptance of benefits by an injured employee of a railroad company which maintains a relief department, shall not bar a recovery by such employee of damages for an injury sustained, is not impliedly repealed by the Act of March 7th, 1905, known as 24 Stat. at Large, p. 962, which contains the same language as the former statute, with a slight variation, but which extends the application of the statute so as to include "any corporation, firm, or individual operating a relief department" for the benefit of employees, and which contains a provision expressly repealing all inconsistent acts.

2. Master and Servant—Injured Servant—Acceptance of Benefits—Statute—Validity.

The Act of March 7th, 1905, known as 24 Stat. at Large, p. 962, which provides that the acceptance of benefits by the servant of an employer maintaining a relief department for employees, shall not bar a recovery by such servant for injuries sustained in the course of his employment, is not an unreasonable exercise of the police power of the State.

3. Master and Servant—Injured Servant—Acceptance of Benefits—Statute—Application.

The Act of March 7th, 1905, known as 24 Stat. at Large, p. 962, which provides that the acceptance of benefits by a servant of an employer maintaining a relief department for his employees, shall not operate as a bar to a recovery by such employee for injuries sustained in the course of his employment, is applicable to a contract existing between the employer and such servant entered into before the passage of the Act, and which contract provides "that the acceptance by the plaintiff (servant) of the benefits under the relief department contract operates as a bar, and a complete defense to the action, the acceptance of such benefits having operated as a full release, satisfaction, and accord of any right of action that the plaintiff might otherwise have," and therefore an employee who sustained an injury after the passage of such Act is entitled to take advantage of its provisions.

4. Courts—Effect of Decisions—Federal Questions.

The decisions of the Federal Supreme Court on Federal questions are conclusive on the State courts.

Appeal by plaintiff, James A. Miller, from a judgment of the Common Pleas Circuit Court of Sumter County, rendered in favor of de-

NOTE.

On the subject of Acceptance of Benefits from a Railroad Relief Department as a Bar to an Action to Recovery for Injuries, and the Validity of Stat-

utes Abrogating such Contracts, see *Phila. B. & W. R. Co. v. Schubert*, 224 U. S. 603 (1912), reported in this volume of Negligence and Compensation Cases Annotated (1 N. C. C. A. p. 892, *post*.

fendant in an action brought to recover damages alleged to have been sustained by plaintiff while in the discharge of his duties as engineer in the employment of the defendant. Reversed.

For appellant—Best & Cunningham, L. D. Jennings, and J. H. Clifton.

For respondents—P. A. Willcox, Mark Reynolds and L. W. McLe-more.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff on the 18th of October, 1909, in the discharge of his duties as engineer while in the employment of the defendant Atlantic Coast Line Railroad Company through its negligence and wantonness. The defendants denied the allegations of negligence and wantonness, and set up the defense that the plaintiff and said railroad company entered into a contract, whereby it was agreed that the plaintiff should become a member of the relief department, and receive a specified sum in case of injury, which sum when accepted by the plaintiff should operate as a release of all claims against the railroad company arising out of said injury; that the plaintiff in pursuance of said contract accepted the sum to which he was entitled as member of the relief department, and thereby released the railroad company from all further liability for said injury. The plaintiff, replying to this defense, alleged that the said contract was null and void, and in contravention of the Act entitled, "An Act to regulate and fix the liability of railroad companies having a relief department, to its employees," approved the 23rd of February, 1903, and which was as follows: "That from and after the approval of this Act, when any railroad company has what is usually called a relief department for its employees, the members of which are permitted or required to pay some dues, fees, moneys or compensation to be entitled to the benefits thereof, upon the death or injury of the employee, a member of such relief department, such railroad company, be, and is hereby, required to pay to the person entitled to the same, the amount it was agreed the employee or his heirs at law should receive from such relief department; the acceptance of which amount shall not operate to estop, or in any way bar the right of such employee, or his personal representatives, from recovering damages of such railroad company, for injury or death caused by the negligence of such company, its agents, or servants, as now provided by law; and any contract or agreement to the contrary shall be ineffective for that purpose." 24 St. at Large, p. 79. Also of the Act entitled, "An Act to fix and

declare the liabilities of any corporation, firm, or individual operating a relief department, to employees, and to regulate the operation of the same," approved the 7th of March, 1905, and which is as follows:

"Section 1. That when any corporation, firm or individual runs or operates what is usually called a relief department for its employees, the members of which are required or permitted to pay fees, dues, money or other compensation, by whatever name called, to be entitled to the benefit thereof, upon the death or injury of the employee, a member of such relief department, such corporation, firm or individual, so running or operating the same, be, and is hereby, required to pay to the person entitled to the same the amount it was agreed the employee, his heirs, or other beneficiary under such contract, should receive from such relief department; the acceptance of which amount shall not operate to estop, or in any way bar the right of such employee or his personal representatives, from recovering damages of such corporation, firm or individual, for personal injury or death, caused by the negligence of such corporation, firm or individual, their servants and agents, as are now provided, by law; and any contract or agreement to the contrary, or any receipt or release given in consideration of the payment of such sum, is and shall be null and void.

"Section 2. That all Acts inconsistent with this Act are hereby released." 24 St. at Large, p. 962.

It appears from the testimony that the plaintiff became a member of the relief department on the 19th of November, 1904, and was still a member when he accepted the amount hereinbefore mentioned. The several drafts delivered to the plaintiff by the relief department after he sustained said injury (omitting dates and amounts) contained these words: "This amount is in payment of benefits for accident disability, for — days from — to — inclusive, and is paid and accepted under the regulations of the relief department." At the close of the testimony, the defendants made a motion for the direction of a verdict, on the ground "that the acceptance by the plaintiff of the benefits under the relief department contract operates as a bar, and as a complete defense to the action, the acceptance of such benefits having operated as a full release, satisfaction, and accord of any right of action that the plaintiff might otherwise have."

His honor, the presiding judge, sustained the motion, and assigned the following reasons for his ruling: (1) Because the Act of 1903 was repealed by the Act of 1905. (2) Because the Act of 1905 was passed subsequent to the time when the plaintiff had become a mem-

ber of the relief department, and that it was therefore inapplicable to the facts of this case. (3) Because the Acts of 1903 and 1905 were in violation of the fourteenth amendment of the Federal Constitution, which provides that "no State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction, the equal protection of the law;" also, that the said Acts were repugnant to § 5, art. 1, of the State Constitution (which contains a provision in similar language), on the ground that they were an unreasonable restraint upon the liberty of contract.

The plaintiff appealed from the order directing a verdict, and the first question that will be considered is whether his honor, the presiding judge, erred in ruling that the Act of 1903 was repealed by the Act of 1905.

The Act of 1903 was intended to apply solely to railroad companies, while the Act of 1905 was intended, not only to embrace railroad companies, but "any corporation, firm or individual." This is the only difference in the two Acts, except a slight variance in their phraseology. It is true that the Act of 1905 contains the provision that all Acts inconsistent with it are repealed, but it cannot be successfully contended that the Act of 1903 is inconsistent with it, since all the provisions of the first are included within the second Act. Therefore the Act of 1903 was not repealed in express terms, and, if repealed at all, it was merely by implication. Repeals by implication, however, are not favored, and in this case such a rule cannot be successfully invoked. *Buchanan v. State Treasurer*, 68 S. C. 411, 47 S. E. 683. The exception raising this question is sustained.

The next question for consideration is whether the presiding judge was in error, when he ruled that the Act of 1905 was inapplicable, for the reason that it was approved after the plaintiff and the defendant railroad company had entered into the contract, whereby the plaintiff became a member of its relief department. This Act was intended to have a prospective effect in those cases where its provisions were violated after its passage; and the fact that the contract out of which such violations arose was made before the Act went into effect does not prevent it from being applicable. The police power is paramount to the liberty of contract; and, when it is determined in a particular case that a statute is not an attempt to exercise that power arbitrarily, then it cannot be successfully contended that it is an unreasonable restraint upon the liberty of contract. The following language used by the writer of this opinion, in the case of *Sturgiss v.*

Railway Co., 80 S. C. 167, 60 S. E. 939, 61 S. E. 261, throws light upon the evil, which the Act of 1905 was intended to remedy, and shows that it was not an attempt to exercise the power of police in an arbitrary manner: "The statute under consideration (Act of 1905) was enacted for the purpose of preventing railroad corporations (and other parties therein mentioned) from inaugurating schemes, the ultimate aim and practical effect of which are to enable the railroad company to bring such influence to bear upon its employees as will force them to surrender their claims for damages when they have sustained injury through the negligence of the company, against which it is not allowed by law to contract. When the regulations of the hospital and relief fund are analyzed, it will be seen that they contemplate the result just mentioned. Not only do they provide that the employee who has paid his assessments, and thereby contributed to the creation and maintenance of said fund, shall be barred from recovering damages for negligence, if he accepts the benefits thereunder, but they likewise provide that his representatives shall not be allowed to bring an action for damages caused by the negligence of the corporation, if they accept the benefit of the fund. Membership in the hospital and relief fund creates the relation of trustee and cestui que trust between the company and the employee, and, although the employee is assessed to maintain the fund, he is not allowed to receive a dollar of the money collected for that purpose, unless he surrenders his claim for damages, when he has been injured through the negligence of the corporation. The fiduciary relation established between the company and the employee places him practically at the mercy of the corporation; for it is a well-known fact that the employees are not persons generally of large means, and frequently are dependent entirely upon their salary or wages for a support. What is the condition of the employee when he is injured through the negligence of the company? He realizes the fact that he has a beneficial interest in a trust fund, and, being in need of the money, he is anxious to get it. He is informed, however, that he must surrender all other claims against the corporation. At this time he, perhaps, is suffering great mental and physical pain, his mind is not so clear as when in health, and the opportune time contemplated by the corporation has arrived when he can easily be persuaded to relinquish his claim for damages arising out of negligence. Public policy demands that the corporation shall not have the opportunity of taking advantage of its employees through the fiduciary relations established between them with that end in view. We only desire to say in conclusion that, if the hospital and relief fund is successfully operated, the practical result will be that the rail-

road company will be enabled to liquidate claims for damages arising out of its negligence, with sums of money contributed in the main by its employees—an indirect way of contracting against its negligence.”

To the same effect is the following language of the court in *McGuire v. Railway Co.*, 131 Iowa, 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706: “The average railroad employee is not a man of wealth. More often than otherwise, his total possessions, if any, are represented by a modest home, and he depends upon his wages to meet his current living expenses. If he has a family, they, too, are dependent upon his earnings. If severely injured, the pain from his wounds, the anxiety for his dependent family, the pressure of his immediate needs, are not conducive to calm and businesslike reflections upon what may prove to be a matter of great importance to him and those who look to him for support. The immediate aid which the relief department offers may under such circumstances assume an exaggerated importance to his eyes, and in his weakness and distress, lead him to accept a benefit inferior to that which he might otherwise be entitled to recover. Moreover, the Legislature may well have believed that, while membership in the relief department was entirely voluntary in the legal sense of the word, it was still possible for the employer, by making the tenure of service more secure to those who became members, to bring to bear an influence in that direction, savoring of moral coercion.” These views are recognized in the case of *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, in which the following language is used: “The Legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are to a certain extent conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the Legislature may properly interpose its authority. But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. ‘The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the

parts, and, when the individual health, safety and welfare are sacrificed, or neglected, the State must suffer.'” The case of *Chicago, B. & O. Ry. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328, shows that the Act of 1905 cannot be construed as an arbitrary exercise of the police power; and that the fact that the contract was made before its passage does not render it inapplicable in this case.

The exception raising this question is sustained.

The last question to be determined is whether the presiding judge erred in ruling that the Acts were obnoxious to the fourteenth amendment of the Federal Constitution, and to § 5, art. 1, of the State Constitution, on the ground that they are an unreasonable interference with the right of contract. Before proceeding to determine this question, we desire it understood that the proposition whether the provisions of said Acts would be regarded as in restraint of the right of contract if parties enter into a new and independent contract subsequent to the injury, but during the time the injured party is a member of the relief department, is not before the court, and, of course, will not be adjudicated. The very able opinion of Mr. Justice Hughes in *Chicago, B. & Q. Ry. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328, is conclusive of the question now under consideration; and, as this court must conform its decisions to those of that court on Federal questions, we will quote somewhat at length from the opinion in that case, as follows: “The acceptance of benefits is, of course, an act done after the injury, but the legal consequences sought to be attached to that act are derived from the provision in the contract of membership. The stipulation which the statute nullifies is one made in advance of the injury that the subsequent acceptance of benefits shall constitute full satisfaction of the claim for damages. It is in this respect that the question arises as to the restriction of the liberty of contract. * * * There is no absolute freedom to do as one likes, or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts or deny to the government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. * * * The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern. * * * It is subject, also, in the field of State action to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction. * * * The

principle involved in these decisions is that where the legislative action is arbitrary, and has no reasonable relation to a purpose which it is competent for government to effect, the Legislature transcends the limits of its power in interfering with the liberty of contract; but, where there is reasonable relation to an object within the government authority, the exercise of the legislative discretion is not subject to judicial review. * * * If the Legislature may require the use of safety devices, it may prohibit agreements to dispense with them. If it may restrict employment in mines and smelters to eight hours a day, it may make contracts for longer service unlawful. In such case the interference with the right to contract is incidental to the main object of the regulation, and, if the power exists to accomplish the latter, the interference is justified, as an aid to its exercise. * * * Having authority to establish this regulation it is manifest that the Legislature was also entitled to insure its efficacy by prohibiting contracts in derogation of its provisions. In the exercise of this power the Legislature was not limited, with respect either to the form of the contract or the nature of the consideration, or the absolute or conditional character of the agreement. It was as competent to prohibit contracts which on a specified event, or in a given contingency, should operate to relieve the corporation from the statutory liability, which would otherwise exist, as it was to deny validity to agreements of absolute waiver. * * *

If the Legislature could specifically provide that no contract for insurance relief should limit the liability for damages, upon what ground can it be said that it was beyond the legislative authority to deny that effect to the payment of benefits, or the acceptance of such payment under the contract? The asserted distinction is sought to be based upon the fact that under the contract of membership the employee has an election after the injury. But this circumstance, however appropriate it may be for legislative consideration, cannot be regarded as defining a limitation of legislative power. The power to prohibit contracts in any case where it exists necessarily implies legislative control over the transaction in spite of the action of the parties. Whether this control may be exercised in a particular case depends upon the relation of the transaction to the execution of a policy, which the State is competent to establish. It does not aid the argument to describe the defense as one of accord and satisfaction. The payment of benefits is the performance of the promise to pay contained in the contract of membership. If the Legislature may prohibit the acceptance of the promise as a substitution for the statutory

liability, it should also be able to prevent the like substitution of its performance.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

JONES, C. J., and HYDRICK, J., concur.

WOODS, J. I concur on the authority of *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328.

CANNEY v. ROCHESTER AGRICULTURAL & MECHANICAL ASSOCIATION.

[SUPREME COURT OF NEW HAMPSHIRE, MARCH 7, 1911]

— N. H. —, 79 Atl. 517.

1. Agricultural Association—Balloon Ascension—Independent Contractor—Liability.

The fact that an agricultural association employed an independent contractor to give an aeronautic exhibition at its fair, does not relieve it from liability to one injured by the descent of the balloon which the operator had left in midair by the aid of a parachute.

2. Evidence—Complaints of Pain—Admissibility.

Conduct and expressions of the plaintiff in an action brought to recover for personal injuries, occurring some months after the accident, and indicative of her mental or bodily health at the time, are competent evidence on that subject.

3. Evidence—Accidents—Admissibility.

Evidence that no accident had resulted from the descent of a balloon in previous years when ascensions were made at an agricultural fair, has no tendency to show that an accident was not likely to happen.

Action transferred from the Superior Court of Stafford County, in which a verdict was rendered in favor of plaintiff, Caroline Canney, for injuries caused by an abandoned balloon falling upon her as she was driving along the highway. Exceptions overruled.

For plaintiff—Kivel & Hughes.

For defendant—Kelley, Harding & Hatch.

DECLARATION.

In a plea of the case for that said defendant at Rochester, on the

CASE NOTE.

Liability for Injury Sustained in Connection With Balloon Ascension.

- I. IN GENERAL, 456.
- II. FAULT OF AN INDEPENDENT CONTRACTOR, 458.

I. In General.

A street car company which owns and manages a park to which it seeks

to attract visitors for the purpose of increasing its revenues, was held liable in *Richmond & M. Ry. Co. v. Moore*, 94 Va. 493, 2 Am. Neg. Rep. 473, 37 L. R. A. 258 (1897), for the death of a boy who was killed by the release of a pole, between 40 and 50 feet long, used in an upright position in connection with a balloon ascension. no notice having been given that the pole would fall when the balloon

twenty-second day of September, 1909, being then and there the owners of a certain tract or parcel of land in said Rochester, and known as the Rochester Fair Ground, did engage in, run and hold a certain exhibition, so called, and more particularly known as the Rochester Fair at said Fair Ground; that the said defendant, as an incident to said exhibition or fair, did employ, by its servants and agents, and carry on divers and various amusements and enterprises, including among other things, stage performances, horse racing and balloon ascensions; that in carrying out said balloon ascension, it became necessary for said defendant, its agents and servants, to inflate a large bag, which was a part of said balloon, with gas, and by means of said bag inflated as aforesaid, said balloon ascended to a great height, carrying in a basket thereof a certain passenger or passengers; that it was the practice and custom well known to said defendant for said passenger or operator, when said balloon had reached a great height, to leave said balloon and alight by means of a certain parachute, so called, and by means of certain mechanical contrivances connected with said balloon to cause said balloon to collapse, by reason of which it was the tendency of said balloon to descend to the earth, all of which was well known to said defendant; that the said defendant, by its servants and agents, on the twenty-second day of September, 1909, at said Rochester, inflated a certain balloon upon said Fair Ground, as aforesaid, and as a part of said exhibition and fair, carried on by said defendant as aforesaid, and caused said balloon operated by its servants and agents to ascend from said Fair Ground during the progress of said Fair, well knowing that said balloon operated as aforesaid, would descend at a point outside of said Fair Grounds, and it became then and there the duty of said defendant, having such knowledge as aforesaid, to operate said balloon in such a manner as to prevent injury and damage, and to warn persons with

was released, and no precautions taken to prevent its falling upon by-standers.

An amusement company which opened its enclosure to the public, who were invited to help get a balloon in readiness for an ascension, no effort being made to keep the public at a safe distance, was bound to have a cleat fastened to a post and holding a guy rope attached to the balloon sufficiently secure to withstand the pressure which it was reasonable to expect it would have to sustain by persons leaning upon the

rope, in connection with other strain which might be put upon it by its ordinary use, and in case of its failure to make such cleat secure it must respond in damages to one who was injured by the fall of a pole caused by the giving away of the cleat. *Peckett v. Bergen Beach Co.*, 44 App. Div. 559, 60 N. Y. Supp. 966 (1899).

An unincorporated association of men engaged in various branches of trade, which had engaged a competent aeronaut to make a balloon ascension

whom said balloon might come in contact in the course of its descent, and of the dangers incident thereto; that said plaintiff, on the said twenty-second day of September, 1909, ignorant of all of the aforesaid, which was well known to the said defendant, was lawfully a traveller in and upon a certain public highway in said Rochester, and while a traveller as aforesaid, and in the exercise of due care, upon said highway, said balloon inflated and sent up by said defendant, its servants and agents, and operated by them in a negligent and careless manner, without notice and without warning, descended with great force and violence upon the head, neck, shoulders, arms and back of said plaintiff, rendering her unconscious, greatly injuring her in her head, neck, shoulders, arms and back, causing her severe bodily and mental suffering, and a shock to her nervous system, from which she has ever since suffered, and will suffer for a long time to come, causing her to expend large sums of money to effect a cure, and all to the damage of the plaintiff in the sum of ten thousand dollars.

STATEMENT OF FACTS: The defendant conducted a four days' fair at Rochester in August, 1909, and agreed with one Kelly for a balloon ascension and parachute jump each day. Kelly was to furnish the balloon, which was abandoned in the air when the operator made his descent. It would find its way to earth at some point within half a mile of the point where it was abandoned, and the defendant was to furnish a team to haul it back to the fair grounds. The defendant knew the balloon might go in any direction; its course being determined by the air currents. There were several highways within a radius of a half mile of the place of ascension, where persons were likely to be traveling; and travel was likely to be greater on days when a fair was held. The defendant took no precaution to warn

on the fair grounds, was held in *Burns v. Herman*, 48 Colo. 359, 113 Pac. 310 (1910), not to be liable for the death of a boy who voluntarily left a place of safety, and was killed by a pole which fell while the balloonist, without direction from the defendant and solely upon the demand of spectators, was preparing to make an ascent, after the manager had expressly forbidden an ascension and had left the grounds.

II. Fault of Independent Contractor.

The fact that a balloon ascension was

given by an independent contractor at a park owned and managed by a street car company to which visitors were attracted for the purpose of increasing the revenues of the company, was held in *Richmond & M. R. Co. v. Moore*, 94 Va. 493, 2 Am. Neg. Rep. 473, 37 L. R. A. 258 (1897), not to relieve the company from liability for its failure to use care in protecting spectators from injury caused by the fall of a pole between 40 and 50 feet long used in connection with the ascension.

But in *Smith v. Benick*, 87 Md. 610,

such travelers. While the plaintiff was driving over one of these highways, being in the exercise of due care, the abandoned balloon descended upon her wagon and inflicted the injuries complained of. The defendant's motions for a nonsuit and the direction of a verdict in its favor, on the ground that Kelly was an independent contractor and that it could not be held liable for any injuries growing out of his exhibition, were denied, subject to exception. The defendant also excepted to the admission of evidence of complaints of present pain, made by the plaintiff some months after the accident, and to the exclusion of evidence that at former exhibitions, given under similar conditions as to the physical features of the country, no accidents had happened.

PEASLEE, J. The case is governed by *Thomas v. Harrington*, 72 N. H. 45, 46, 16 Am. Neg. Rep. 600, 608, 54 Atl. 285, 286, 65 L. R. A. 742. It is there said concerning the duties of defendants who create extra hazards upon a public highway: "They knew the work could not be done, in its reasonable and proper prosecution, without increasing the danger to public travel in the highway at that point. The danger arose directly from the work which they required to be done, and not from the negligent manner in its performance. In such a case, one cannot avoid responsibility for the consequences naturally to be apprehended in the course of the performance of the work, by employing another to do the work as an independent contractor." The motions were properly denied.

"The conduct and expressions of the plaintiff, indicative of the condition of her mental or bodily health at the time, were competent

4 Am. Neg. Rep. 641, 42 L. R. A. 277 (1898), the court refused to impose liability upon the proprietor of a public resort who employed an independent contractor to make a balloon ascension to draw visitors, for an injury sustained by a visitor who was struck by a pole used to keep the balloon in position while it was being inflated, in consequence of the negligence of the balloonist while he was attempting to raise the pole. It appeared in this case that a guard rope intended to keep the people at a safe distance had been placed around the balloon. In announcing its decision the court based

its holding upon the doctrine that "where an owner and proprietor of land employs a competent person to do work which of itself is not a nuisance, or of which the necessity or probable effect would not be to injure others, and such person is an independent contractor, the employer is not responsible for such negligence as is entirely collateral to, and not a probable consequence of, the work contracted for." The court distinguished the case cited in the preceding paragraph by showing that, in that case, there was no guard rope and no notification that the pole would fall when the balloon ascended.

evidence on that subject." *Chamberlin v. Ossipee*, 60 N. H. 212, and cases cited.

"Evidence that no accident had happened in the previous years when balloon ascensions were made was offered by the defendant, and was excluded. The defendant's position appears to have been that this fact had some tendency to show that an accident was not likely to happen. It is not apparent in what way it tended to prove the fact sought to be shown. The proposition that such an accident as this might have followed any ascension cannot be controverted. It is equally plain that the percentage of cases in which an accident would occur would be small. All this was well known to the defendant, and must have clearly appeared to the jury from a consideration of the geographical features of the country surrounding the fair ground. If a question of tendency, capacity, or the like were involved, the evidence might be competent. But there is no such element here. If experience had established certain facts or probabilities as to the course and distance the balloon would travel before a wind of the direction and the velocity shown on the day in question, or if it had tended to establish other material facts, the result might have been admitted in evidence, if it appeared to the court to be sufficiently related to the fact in issue to be of value in the determination thereof. There is no suggestion of such an element in the facts offered. The course the balloon would take was dependent upon the direction of the wind. This essential element in a comparative test is not found in the proffered evidence. If this did not render the evidence wholly irrelevant, and therefore inadmissible as matter of law, it at least left it so inconclusive as to be plainly immaterial, and therefore inadmissible, if found to be "too remote to be useful." *Cross v. Wilkins*, 43 N. H. 332, 334. Upon this issue the presiding justice found in favor of the plaintiff. After it was determined, as matter of fact, that the question "should be excluded," its inadmissibility in that trial was established as matter of law. *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55.

Exceptions overruled. All concurred.

RONEY v. CITY OF DES MOINES.

[SUPREME COURT OF IOWA, MARCH 15, 1911.]

150 Iowa, 447.

1. Municipal Corporations—Sidewalks—Coal Hole—Liability.

In an action against a city to recover damages for injuries to a pedestrian caused by the improper construction and fitting of the covering of a coal hole in a sidewalk located in a populous part of a city, evidence held to justify a finding that the sidewalk was originally constructed in an unsafe manner.

2. Municipal Corporations—Sidewalk—Defective Construction—Liability.

A city is liable for negligent injuries caused by a defect in a sidewalk, which, when originally constructed was unsafe, although it did not construct the walk through its own agencies and had no knowledge of its defective condition.

3. Municipal Corporations—Sidewalk—Construction.

There is a broad presumption, where a walk is shown to have been constructed in a populous part of the city, that the city built or assumed control over the walk.

4. Municipal Corporations—Defective Sidewalk—Notice.

Notice to a city, either actual or constructive, of the defective condition of a sidewalk must be shown to hold the city liable for injuries caused by some defect, where the walk was originally constructed in good condition.

5. Municipal Corporations—Officers—Defective Walk—Notice.

In an action against a city to recover for personal injuries to a pedestrian caused by the defective condition of the covering of a coal hole in the sidewalk, it is proper to instruct the jury that the defendant, as a municipal corporation, obtains notice and knowledge through its officers and representatives, and if such officers and representatives as were charged with the duty of constructing and maintaining the sidewalk at the time and place of the accident, or of inspecting the same and of keeping it in proper condition, received notice of the improper construction or defective condition of the walk where the injury occurred, such notice is imputable to the city.

Appeal by defendant from a judgment of the District Court of Poke County, rendered in favor of plaintiff, Albert Roney, in an action brought to recover damages for injuries caused by the defective condition of a sidewalk. Affirmed.

For appellant—Robert O'Brennan, J. M. Parsons, and Dale & Harvison.

NOTE.

On the subject of Liability of Municipal Corporations for Coal-Hole Accidents, see note in 18 Am. Neg. Rep. 217.

And on the subject of Liability of Landlord or Tenant for Coal-hole Accidents, see note in 3 Am. Neg. Rep. 314.

For appellee—Sullivan & Sullivan.

PETITION.

The plaintiff states: That the defendant is a city of the first class organized and existing under the laws of the State of Iowa; that Third street in said city runs north and south and that there is a sidewalk thereon constructed of cement from ten to fifteen feet in width running along the west side thereof between Walnut and Court avenue; that during the month of May, 1909, and continuously for many months prior thereto, said defendant had negligently allowed to be created and exist, a dangerous place in said sidewalk consisting of a defective covering to a manhole or coal chute, the said covering being constructed of iron and fitting so improperly over said manhole or coal chute that whenever the same would be touched or stepped upon the same would tip up and strike the person or pedestrian touching it; that said defects arose from faulty original construction and from failure to keep the same in proper repair; that said defendant and its officers and agents charged with the construction and maintenance of said walk had actual knowledge of its faulty construction and aforesaid dangerous condition at the time, and long prior to the happening of the injury herein complained of and that said condition of said walk and covering of said manhole and coal chute had been known to the defendant and those charged with its maintenance and repair for such a length of time prior to said accident, as that in the exercise of reasonable care and diligence they might have repaired the same.

That on the 8th day of May, 1909, the plaintiff, while passing over said walk and manhole or coal chute and without knowledge of the existence of said hole and of the defects in said covering, and without any negligence on his part contributing thereto, stepped upon said covering, slipped and fell into said manhole or coal chute, violently striking himself about the arms, chest, stomach and lower limbs and painfully bruising and injuring him about the body and limbs and especially sustaining a very serious injury to his back, spine, pneumo nerve, heart and stomach.

That said injury is permanent in character; that as a result thereof the plaintiff suffered great pain and anguish, was confined to his bed for a period of about ten weeks and was compelled to employ nurses at an expense of one and one-half dollars (\$1.50) a day, and that he has paid out for necessary medical attendance and medicines the sum of one hundred (\$100) dollars; that in the future he will suffer great pain and anguish and be compelled to pay out large sums for

medicines and medical attendance, and that by reason of said injury and facts as aforesaid, he has sustained damages in the sum of five thousand (\$5000) dollars, no part of which has been paid.

Wherefore, plaintiff prays judgment against the defendant for the sum of five thousand (\$5000) dollars and costs of this suit.

AMENDMENT TO PETITION.

The plaintiff, for amendment to his petition heretofore filed, re-alleging and re-affirming all the matters and facts therein set forth as though fully pleaded herein, says:

That on the 8th day of May, 1909, and long prior thereto, he was a strong able-bodied man and in good health and engaged in the occupation of a miner and earned four (\$4.00) dollars per day; that since his injury and the matters complained of in his original petition, he has been unable to perform any manual work whatever, and that his injuries are of such a permanent character, that he will not in the future be able to perform manual work and has been damaged greatly thereby, all because of the negligence and want of care of the defendant herein.

Wherefore, plaintiff demands judgment against the defendant as in his original petition.

AMENDMENT TO PETITION.

The plaintiff, for an additional amendment to his petition and amendment thereto heretofore filed, re-alleging and re-affirming all the matters and facts therein set forth as though fully pleaded herein says:

That among other things, that the coal chute and manhole referred to in plaintiff's petition, was originally negligently constructed in this: That the iron covering instead of being set upon an iron case-ment which should be set firmly in the cement, was set directly upon a narrow rim of cement, which was neither strong nor durable, and that the same soon by use and the force of the elements crumbled off and left the covering of said manhole or coal chute without support, and that this plaintiff stepped upon the same and it gave way and precipitated him into the hole and resulted in the injuries complained of in his original petition and amendment thereto.

Wherefore, plaintiff demands judgment as in his petition and amendment thereto.

AMENDMENT TO PETITION.

The plaintiff, for additional amendment to his petition heretofore

filed, re-alleging and re-affirming all the matters and facts set forth in his original petition and all amendments thereto, as though fully plead herein, says, that the injuries sustained by the plaintiff on account of the negligence of the defendant are permanent in character, and this plaintiff has suffered great loss and damage thereby.

Wherefore, he demands judgment for \$10,000, no part of which has been paid.

ANSWER.

Now comes the defendant, City of Des Moines, and for its answer to the petition of the plaintiff herein says:

That it both generally and specifically denies each and every affirmative allegation in said petition contained not hereinafter in this answer expressly admitted.

Defendant admits that it is a city of the first class, organized and existing under the laws of the State of Iowa, in pursuance of Chapter 48, Acts of the Thirty-second General Assembly; and admits that Third street in said city runs north and south.

Defendant expressly denies that it has been guilty of any act of negligence causing or contributing to the injuries complained of in said petition.

For further answer to said petition, the defendant alleges and charges the fact to be that if the plaintiff was injured as is alleged and set forth in said petition, that the plaintiff did not exercise due care and caution and that said injuries were due to the negligence of the plaintiff contributing thereto, and for which this defendant is in no wise responsible.

Wherefore, defendant prays that said petition be dismissed and that it be allowed to depart hence with judgment for its costs.

DEEMER, J. The negligence charged against the city is as follows:

"That during the month of May, 1909, and continuously for many months prior thereto, said defendant had negligently allowed to be created and exist a dangerous place in said sidewalk, consisting of a defective covering to a manhole or coal chute, the said covering being constructed of iron, and fitting so improperly over said manhole or coal chute that whenever the same would be touched or stepped upon the same would tip up and strike the person or pedestrian touching it; that said defects arose from faulty original construction, and from failure to keep the same in proper repair; that said defendant and its officers and agents charged with the construction and maintenance of said walk had actual knowledge of its faulty construction and afore-

said dangerous condition at the time, and long prior to the happening of the injury herein complained of, and that said condition of said walk and covering of said manhole and coal chute had been known to the defendant and those charged with its maintenance and repair for such a length of time prior to said accident as that in the exercise of reasonable care and diligence they might have repaired the same; that among other things that the coal chute and manhole referred to in plaintiff's petition was originally negligently constructed, in this: that the iron covering, instead of being set upon an iron casement, which should be firmly set in the cement, was set directly upon a narrow rim of cement, which was neither strong nor durable, and that the same soon by use and the force of the elements crumbled off, and left the covering of said manhole or coal chute without support."

There was testimony in support of these allegations, although claim is made for defendant that there is no such testimony, and particular insistence is made upon the proposition that, conceding the walk to have become out of repair, there is no testimony that it knew or in the exercise of reasonable care should have known of the alleged defect arising after the construction of the walk and coal chute or coal hole. Upon this latter proposition the case is ruled by *Platts v. City of Ottumwa*, 148 Iowa, 636, 127 N. W. 990. We need not set out the testimony on this point, for it is sufficient to say that there was enough of it to take the case to the jury. The principal points relied upon for a reversal are alleged errors in the instructions given by the trial court. Practically each and every one is criticized, and it would seem from a reading of appellant's argument that the trial court had no conception of the case which was on trial before it.

An examination of the instructions shows, however, that as a rule they announce propositions of law which have long been settled and are well understood by the profession. The trial court gave the following, among other, instructions:

"(5) You will determine whether the defendant was negligent, as charged by the plaintiff in his petition. The plaintiff charges in his petition that the defendant negligently constructed the sidewalk on the west side of West Third street, a short distance south of Walnut street, in this: That the iron covering thereof, instead of being placed upon a casement firmly set in cement, was set directly upon a narrow rim of cement, which had broken and crumbled off, leaving the covering of said manhole or coal chute without sufficient support, so that when plaintiff stepped thereon it gave away, turning with one edge up and the other down, precipitating plaintiff into said manhole or coal chute and upon the edge of said covering, thereby injuring plain-

tiff about the breast, stomach, limbs, and other parts of his body. It was the duty of the defendant in the construction and maintenance of the sidewalk and manhole or coal chute at the place in question to exercise ordinary care to provide against accidents to persons using the same, and a failure on its part to exercise such care, as charged by the plaintiff in his petition, would constitute negligence. In determining whether the defendant was negligent, you will consider the definitions of 'ordinary care' and 'negligence' elsewhere given you in these instructions; and you will consider, as shown by the evidence, the place where the accident is alleged to have occurred, and the surroundings thereabout; the character and condition of the sidewalk and manhole at said place; the manner of its construction and its condition at the time of the accident; the length of time said sidewalk and manhole had been in the condition they were at the time the accident in question is alleged to have occurred; what the defendant knew, or in the exercise of ordinary care should have known, in relation thereto; what defendant did, or in the exercise of ordinary care should have done, in relation thereto, together with any other facts or circumstances disclosed by the evidence showing, or tending to show, that the defendant was or was not negligent as charged by the plaintiff in his petition."

"(7) The defendant is a municipal corporation, and, as such, obtains notice and knowledge through its officers and representatives, and you are instructed that by negligence of said defendant, as used in these instructions, is meant the negligence of such officers or representatives of the defendant as were charged with the duty of constructing and maintaining the sidewalk at the time and place of the accident, or inspecting the same and keeping it in proper condition; that notice on the part of the defendant of improper construction or defective condition as alleged by the plaintiff means notice to the officers or representatives of the defendant charged with the duty of constructing and maintaining said sidewalk or inspecting the same and keeping it in proper condition; and that knowledge on the part of the defendant of said sidewalk or manhole being out of repair, as alleged by the plaintiff, means knowledge of the officers or representatives of the defendant charged with the duty of maintaining or inspecting the same and keeping it in proper condition."

"(8) The plaintiff has offered and introduced evidence tending to show that the manhole or coal chute and covering thereon, at the place where the plaintiff alleges he was injured, was out of repair prior to the time of such accident, and the experience of other persons at said place shortly before the time plaintiff alleges he was injured.

In this connection you are instructed that such evidence may be considered by you as bearing upon, if it does bear upon, the question of notice to the defendant of the condition of said manhole or coal chute and covering thereon at the time plaintiff claims to have been injured, but you will not consider said evidence for any other purpose."

"(9) If you find that the manhole or coal chute in the sidewalk at the place where plaintiff alleges he was injured was at the time of the accident in the condition stated by the plaintiff in his petition, then, before you can find the defendant was negligent in leaving or permitting the same to be or remain in such condition, the plaintiff must prove by a preponderance of the evidence that such condition had existed for such a length of time prior to the accident in question as that the defendant in the exercise of ordinary care should have known thereof long enough before the time of the alleged accident to plaintiff to have removed or remedied such defects before the time of such alleged accident."

The first proposition, that there was no testimony to justify these instructions, has already been answered. It may not be inappropriate to say in this connection, however, the defendant's counsel are relying upon a very technical proposition, to wit, that there is no testimony that defendant constructed the walk or manhole and coal chute. This perhaps is true, but in no manner changes the legal proposition upon which plaintiff was relying, to wit, that, if the sidewalk as originally constructed was defective and unsafe, the city would be liable, although it had no knowledge of the defective condition. That this is the rule for this State, although the city may not have constructed the walk through its own agencies, is well settled by our previous cases. See *Cramer v. Burlington*, 39 Iowa, 512; *Cook v. Anamosa*, 66 Iowa, 427, 23 N. W. 907; *Evans v. Iowa City*, 125 Iowa, 202, 100 N. W. 1112. There is a very broad presumption where a walk is shown to have been constructed in a city street and in a populous part of the city, as this one was, that the city built or assumed control of the walk (*Shannon v. City*, 74 Iowa, 22, 36 N. W. 776), and no notice to the city of the actual condition of such a walk is necessary to be shown. If the walk when constructed was in good condition, and afterward became dangerous or out of repair, then notice to the city, actual or constructive, of such defective condition, must be shown. *Pace v. Webster City*, 138 Iowa, 107, 115 N. W. 888.

It was for the jury to say under the testimony adduced whether or not the walk with the coal chute was negligently constructed. The following is some of the testimony with reference to the matter: "I saw this walk when it was originally constructed. It had a kind of a

cement shoulder to rest upon; that is all. I presume the walk must be five or six inches thick, and this covering is about one-half inch thick and stuck up about one-sixteenth of an inch above the sidewalk. The shoulder was the full thickness of the sidewalk except the part taken for the iron cover, and it would be four or five inches thick. The shoulder had been broken off at different times by throwing in coal. * * * When the walk was built, it was built for a coal chute and no frame put on, no iron frame. I noticed it quite a few times that it was kind of loose. I knew this coal chute or hole was there before this accident for years. It had been there for years before he was hurt. This covering was sunk in the pavement may be half an inch. The frame was sunk into the walk may be half an inch. The lid was level with the walk. It was rounded over. There was a kind of a little shoulder around on the inside. It did not have an iron in which to set. * * * The iron lid was resting right on the cement. The shoulder wasn't more than a quarter or a half an inch wide, and once in awhile I would see the lid away from it as much as a half an inch up on the sidewalk. I saw this a number of times before and after May 8, 1909. I could not tell you how many months before. * * * When you would step on either side, it would tip up, slip in the cement, because there was no rim in there. * * * The width of this shoulder was an inch or more, about an inch of the shoulder where it was not chipped. I guess the lid was about an inch thick. This slope was about an inch or so deep down to the shoulder. It was bigger than the lid, so as to leave it a little loose. * * * The iron lid was resting right on the cement. The shoulder wasn't more than a quarter or half inch wide, and once in awhile I could see the lid away from it as much as a half an inch upon the sidewalk. I saw this a number of times before and after May 8, 1909. I could not tell you how many months before." From this a jury was justified in finding original faulty construction of the walk. *Stein v. City of Council Bluffs*, 72 Iowa, 180, 33 N. W. 455, is not in point.

Appellant contends that there is no charge in the petition of actual knowledge or notice on the part of the city of the defective walk and no claim of any other negligence than in the original construction thereof; but this is a manifest error, as a reading of the petition, from which we have already quoted, will demonstrate. The case in this respect is not ruled by *Edwards v. City*, 138 Iowa, 424, 116 N. W. 323, or any of the other cases cited for appellant.

It is said that the instructions are conflicting; but we do not so find them. The seventh is said to be erroneous. It has support in previous cases, and is not in conflict with *Edwards v. City*, 138 Iowa

425, 116 N. W. 323. The eighth is complained of because it does not confine the negligence to that charged in the petition. But the complaint is without merit. Taken in connection with the other instructions, it is clear that the negligence was confined to that charged in the petition.

Certain rulings on the admission and rejection of testimony are complained of, and it is also insisted that the court was in error in permitting the plaintiff to withdraw certain testimony with reference to the condition of the walk and coal chute after plaintiff received his injuries. We have examined each and all of the rulings complained of, and find no error. The propositions presented contain nothing new or novel, and we shall not elaborate thereon. It is enough to say that we find no prejudicial error. No complaint is made in argument of the size of the verdict, and, if there had been, we should not be disposed to interfere.

There is no error of which defendant may justly complain, and the judgment must be, and it is, affirmed.

BYRD, Adm'x v. PINE BLUFF CORPORATION.

[SUPREME COURT OF ARKANSAS, MARCH 18, 1912.]

— Ark. —, 145 S. W. 562.

1. Master and Servant—Negligence of Master—Burden of Proof.

An employee who brings an action to recover damages for personal injuries alleged to have resulted from some negligent act of the master has the burden of proof.

2. Master and Servant—Electric Light Wires—Safe Place.

An electric light company, which has merely contracted to furnish electricity to the owner of a private building, who has installed for himself the necessary wires and appliances, is not chargeable with negligence because of its failure to ascertain whether such wires were kept properly insulated, before sending an employee to remove from the building an unused gas-light wire-tubing which ran in close proximity to the electric light wires.

3. Master and Servant—Electric Light Wires—Assumed Risk.

It is the duty of an employee of an electric light company, who has been warned of the danger of permitting gas fixtures, which he is engaged in removing from a building, to come in contact with electric light wires, to take the necessary precautions for his own safety.

Appeal by plaintiff, Virginia Byrd, as administratrix of the estate of John Byrd, deceased, from a judgment of the Circuit Court of Jefferson County directed in favor of defendant in an action brought to recover damages for the death of plaintiff's decedent by electric shock. Affirmed.

For appellant—Caldwell & Brockman, and Crawford Hooker.

For appellee—Bridge & Wooldridge.

DECLARATION.

The plaintiff, Virginia Byrd, states that she is the lawful and duly appointed and qualified administratrix of the estate of John Byrd, deceased, who died intestate in Pine Bluff, Jefferson County, Arkansas, on the 16th day of July, 1909, and that she sues defendant as such administratrix for the benefit of the estate of the deceased, and in her own right as widow of the deceased.

NOTE.

On the subject of Injuries from Electricity, see note in 19 Am. Neg. Rep. 508.

And on the subject of Injuries to Employees by Electricity, see notes of cases in 21 Am. Neg. Rep. 259-271.

Plaintiff as such administratrix states that the defendant, The Pine Bluff Corporation, is a corporation organized under the laws of the State of Arkansas, and was on said 16th day of July, 1909, and now is engaged in operating a water and light plant in the City of Pine Bluff, Arkansas, and from said plant is engaged in furnishing electric lights to the City of Pine Bluff. That the defendant company has in operation a system of wires by means of which electricity is now and was on said 16th day of July, 1909, conducted to a certain building situated on the east side of Main Street in the city aforesaid, and occupied and controlled by Stern & Levi, a firm engaged in the mercantile business, and for cause of action against the defendant company, plaintiff, Virginia Byrd, states:

I. That on the 16th day of July, 1909, while engaged as a laborer for said Pine Bluff Corporation, in which capacity he had been serving for the past seven years, and under the orders and directions of said defendant company, and while removing some gas-light wires from the aforesaid building, which wires were not used for the purpose of conducting electricity to said building, nor had they ever been so used, deceased, after disconnecting the gas-light wire fixtures on the inner walls of said building, had returned to the outside of said building and was drawing said wire from the building through a small excavation in the wall, holding the wire with his hands. That while thus removing said gas-light wire, the end of said wire yet on the inside of the wall, came in contact with an electric wire, the property of the defendant, which wire was heavily charged with electricity and that the current was immediately transmitted into the body of the deceased, John Byrd, thereby killing him within a few minutes.

The plaintiff states that at the place where the wire held by the deceased came in contact with the said defendant's electric wire, the electric wire was in a bad and unsafe condition, the insulation on said wire having been allowed, by the careless, willful and wanton acts of the defendant through its agents and employees, to wear off, and that in attempting to repair the same, defendant had made a crude and unworkmanlike connection where said insulation had worn off, and that said defendant had allowed the same to remain in an exposed and unsafe condition. That the deceased came to his death by the careless, negligent and wrongful manner in which the defendant, by its agents and employees, had constructed and maintained said electric wire thereby failing to provide deceased with a safe place to work. That the deceased was not an electrician, that he knew nothing whatever of the condition of said wire at the time, and that it was not any

part of his duty to work with or handle in any way the electric wires of said defendant company.

Plaintiff further states that between the time said injuries were inflicted upon said deceased as aforesaid and his death, he endured great physical pain and mental anguish and was conscious of the same, and that by reason thereof, the estate of the said John Byrd has been damaged in the sum of five thousand dollars (\$5,000).

Wherefore, plaintiff prays judgment against the defendant for the sum of \$5,000 for the benefit of the estate of the deceased.

II. For further cause of action against the defendant, Virginia Byrd, as administratrix aforesaid, alleges that she is the duly appointed and qualified administratrix of the estate of John Byrd, deceased, who was injured on the day aforesaid and died as aforesaid, intestate and leaving as his heir at law, Virginia Byrd. That the defendant, The Pine Bluff Corporation, is a corporation organized under the laws of the State of Arkansas, and was on said 16th day of July, 1909, and now is engaged in operating a water and light plant in the City of Pine Bluff, Arkansas, and from said plant furnishes electric lights to the City of Pine Bluff. That the defendant company has in operation a system of wires by means of which electricity is now and was on said 16th day of July, 1909, conducted to a certain building situated on the east side of Main street in said city and occupied and controlled by Stern & Levi, a mercantile business.

That on the 16th day of July, 1909, while engaged as a laborer for the said Pine Bluff Corporation, in which capacity he had been serving for the past seven years, and while under the orders and directions of defendant company, and while removing some gas-light wires from the aforesaid building, which wires were not used for the purpose of conducting electricity to said building nor had they ever been so used, deceased after disconnecting the gas-light wire fixtures on the inner walls of said building, had returned to the outside of the building, and was drawing said wire from the building through a small excavation in the wall, holding the wire with his hand. That while removing said gas-light wire, the end of said wire yet on the inside of the wall came in contact with an electric wire, the property of the defendant, which wire was heavily charged with electricity and that the current was immediately transmitted into the body of the deceased, John Byrd, thereby killing him within a few minutes.

Plaintiff states that at the place where the wires held by the deceased came in contact with the said defendant's electric wire, the electric wire was in a bad and unsafe condition, the insulation on said

wire having been allowed, by the careless, willful and wanton acts of the defendant through its agents and employees, to wear off, and that in attempting to repair the same defendant had made a crude and unworkmanlike connection where said insulation had worn off, and that the defendant had allowed the same to remain in an exposed and unsafe condition. That the deceased came to his death by the careless, negligent and wrongful manner in which the defendant, by its agents and employees, had constructed and maintained said electric wire thereby failing to provide deceased with a safe place to work. That the deceased was not an electrician, that he knew nothing whatever of the condition of said wire at the time, and that it was not any part of his duty to work with or handle in any way the electric wires of said defendant company.

And plaintiff further states that at the time of the death of deceased, John Byrd, he was twenty-nine and one half years old; that he was strong, robust and in good health, and was free from disease; that he was moral and upright and an industrious man; that he was a kind and affectionate husband; that he was earning the sum of six hundred dollars (\$600) per year and contributed all of his earnings, except what was necessary for his personal use, not exceeding \$100 per year, to the support, maintenance and comfort of his family; that when killed he was in the prime and vigor of life and had an expectancy of life of thirty-five years; that his earning capacity was increasing, and but for the wrongful and negligent act of the defendant he would have continued during said expectancy to earn the amount that he was earning at the time of his death, and more, and would have continued to contribute the said portion of his earning to the support, maintenance, comfort and care of his said family, and to the said Virginia Byrd the comfort and benefit of his society and companionship. That by reason of the negligent and wrongful act of the defendant resulting in the death of the said John Byrd as aforesaid, his widow has sustained injuries and damages in the sum of ten thousand dollars (\$10,000).

Wherefore, plaintiff, as administratrix, and as widow and next of kin of John Byrd deceased, prays judgment against the defendant, The Pine Bluff Corporation, for the sum of ten thousand dollars with interest and costs and proper relief.

AMENDED ANSWER.

The defendant, The Pine Bluff Corporation, for answer to the complaint herein states:

It is not advised as to whether or not the plaintiff, Virginia Byrd,

is the duly appointed and qualified administratrix of the estate of John Byrd, deceased, and in order to require proof of same denies said allegation. And for answer to the allegation of paragraph one, states:

It admits that the said John Byrd at the time of his death was in the employ of the defendant and that he was engaged in removing certain gasoline wire tubing from a building occupied by Stern & Levi, on the 16th day of July, 1909, and that said wires were not used for conducting electricity to said building.

Defendant denies that said gasoline light tubing came into contact with an electric wire, the property of defendant, or that such wire was heavily charged with electricity, or that the current from such wire killed the said John Byrd. Defendant denies that said wire was in a bad or unsafe condition, and denies that the insulation on said wire was allowed, by the careless, willful and wanton acts of the defendant, through its agents and employees, to wear off; and denies that in attempting to repair same defendant had made a crude and unworkmanlike connection where said insulation had worn off; and denies that said defendant had allowed the same to remain in an unsafe condition; and denies that the deceased came to his death by the careless, negligent and wrongful manner in which the defendant, by its agents and employees, had constructed and maintained said electric wires, thereby failing to provide deceased with a safe place to work; and denies that defendant had constructed or maintained said wires in such manner or otherwise; and denies that said deceased knew nothing whatever of the condition of said wire at the time; and denies the allegation that it was not any part of his duty to work with or handle, in any way, the electric wires of said defendant company. Defendant furthermore denies the allegation that between the time that said injuries were inflicted upon deceased to the time of his death, he endured great physical pain and mental anguish, and was conscious of the same; and denies that by reason thereof the said estate of John Byrd has been damaged in the sum of five thousand dollars or any other sum.

Defendant further answering states that whatever danger or risk was connected with the handling of said gasoline wire in connection with the electric wires existed or would ordinarily exist, was assumed by said deceased in his employment with defendant company, and this defendant is not responsible for any injuries that he may have received by reason of his services in connection therewith, and the defendant pleads such assumption of risk by the said John Byrd, in bar of any recovery herein by the plaintiff.

And the defendant further pleading states that the death of the said deceased was caused by his own negligence in handling the said

gasoline tubing, in a careless and negligent way and letting it come in contact with the electric wire, if his death was caused in the manner alleged by the plaintiff, or by said gasoline wire coming in contact with the wire charged with electricity at all; that said negligence on his part contributed to his death; and this defendant pleads his said contributory negligence as a defense to any and all claims and demands set forth by said plaintiff against this defendant arising on account of the death of said deceased.

And for answer to paragraph two of said complaint, defendant states:

Defendant does not know whether the plaintiff has been duly appointed and qualified as the administratrix of the estate of John Byrd, deceased, and in order to put same in proof, denies said allegation and demands proof that said plaintiff, Virginia Byrd, is the sole heir of said deceased.

It admits that said John Byrd came to his death while removing some gasoline wire tubing from the inner walls of the building of Stern & Levi; and denies that said wire tubing came in contact with an electric wire, the property of said defendant; and denies that said wire was heavily charged with electricity; and denies that the current was immediately transmitted into the body of deceased, or that such current killed him.

It denies that where the said wire tubing came into contact with the electric wire, the said electric wire was in a bad and unsafe condition; and denies that the insulation on said wire had been allowed, by the careless, willful and wanton acts of the defendant, through its agents and employees, or otherwise, to wear off; and denies that defendant attempted to repair same, or that in attempting to repair same, had made a crude and unworkmanlike connection where said insulation had worn off; and denies that the defendant had allowed the same to remain in an exposed and unsafe condition, or that it was responsible for such condition, if it existed; defendant denies that deceased came to his death by the careless, negligent or wrongful manner in which defendant, by its agents and employees, had constructed and maintained said electric wire, thereby failing to provide the deceased with a safe place to work; and denies that it constructed or had anything to do with the maintaining of such wire. Defendant denies the allegation that the deceased knew nothing of the condition of the wire with which said wire tubing may have come into contact; and denies the allegation that it was no part of his duty to work with or handle in any way the electric wires of said defendant company. Defendant denies that said deceased contributed all his salary except

one hundred dollars to the support, maintenance and comfort of his family, and that his expectancy of life was thirty-five years; and denies that his earning capacity was increasing, and that but for the wrongful and negligent act of the defendant he would have continued during such expectancy to earn the amount that he was earning at the time of his death or more; and denies that he would have contributed such portion to the support, maintenance and comfort of his said family. It denies that by reason of the negligence and wrongful act, his widow had sustained injuries and damages in the sum of ten thousand dollars, or any other sum.

Defendant further answering states that whatever danger or risk was connected with the handling of said gasoline line wire in connection with the electric wires existed or would ordinarily exist, was assumed by said deceased in his employment with defendant company, and this defendant is not responsible for any injuries that he may have received by reason of his services in connection therewith, and the defendant pleads such assumption of risk by the said John Byrd, in bar of any recovery herein by the plaintiff.

And the defendant further pleading states that the death of the said deceased was caused by his own negligence in handling the said gasoline tubing, in a careless and negligent way and letting it come in contact with the electric wire, if his death was caused in the manner alleged by the plaintiff, or by said gasoline wire coming in contact with the wire charged with electricity at all; that said negligence on his part contributed to his death; and this defendant pleads his said contributory negligence as a defense to any and all claims and demands set forth by said plaintiff against this defendant arising on account of the death of said deceased.

Having fully answered, the defendant prays to be dismissed with its costs.

McCULLOCH, C. J. The Pine Bluff Corporation, a private corporation, is engaged in the business of furnishing water, gas, and electricity to the people of the city of Pine Bluff, and John Byrd was employed as a workman in the gas and water department. He was killed by an electric shock on account of a wire, of which he had hold and was removing from a building, coming in contact with an uninsulated electric light wire, and this is an action against the company to recover damages on account of his death. The trial court instructed a verdict in favor of the defendant, and this appeal raises solely the question whether or not the evidence was sufficient to warrant the submission of the case to the jury.

Byrd was sent by his employer to remove from a store building, then occupied by Stern & Levy, the old gas fixtures and apparatus, the use of which had been discontinued by the occupants. He had with him a helper, who was working under him, and they both were advised of the danger of allowing the wire to come in contact with an electric light wire. After taking down the fixtures inside of the building, it became necessary to remove the small copper wire tubing through which the gas had been supplied. This wire ran along the ceiling of the building between two electric light wires, and came out of the building at the top of a window, and thence to the ground through a three-quarter inch iron pipe. After cutting loose this wire on the inside, Byrd was standing on a box on the outside of the window, drawing the wire through a hole in the window casing, when the end of the wire on the inside of the building fell across an uninsulated electric light wire, and the shock resulted. Byrd cried out in his pain, and his companion came to him and removed the wire, but too late to save his life. The uninsulated part of the electric wire, with which the gas wire came in contact, covered a space of about two inches, and was about a foot from the meter, which was upon the inside of the wall, near the top of the window through which the gas wire came; the uninsulated space being between the meter and the ceiling.

It does not appear from the testimony who put in the electric wiring in the building; and there is no evidence that the defendant corporation had anything to do with it. Mr. Levy, the only witness who testified on that subject, stated that the house was wired for electricity before they moved into the building about three years before the accident, and that the electricity had been supplied by another company in Pine Bluff engaged in that business; but the service had been discontinued after the installation of the gas in the building. Later they decided to use electric lights instead of gas, and employed the defendant to furnish electricity and remove the gas fixtures. Some time before this—the exact time is not disclosed—the defendant attached its wires to the wires on the outside of the building, and proceeded to furnish electric current. There is no evidence that defendant had anything to do with the installation or maintenance of the wires and appliances on the inside of the building.

The burden was upon the plaintiff to show by competent testimony that the death of Byrd was caused by some negligent act of his employer, the Pine Bluff Corporation. This, we think, plaintiff has entirely failed to do. The defendant was not responsible for the defective condition of the wires on the inside of the building. It had the right, by contract with the owner, to furnish the current of elec-

tricity, and to allow the owner to assume the responsibility for the condition of the appliances in the building. It was not bound to maintain a system of inspection to see that the wires were kept properly insulated. 1 Joyce on Electric Law, § 445c; National Fire Ins. Co. v. Denver Consol. Elec. Co., 16 Colo. App. 86, 63 Pac. 949. We are aware that there are authorities which tend to sustain the contrary view; but we believe it to be unjust, as well as unsound upon principle, to say that a lighting company is compelled to maintain in good repair appliances on the inside of a private building which the owner has a right to install for himself, or by some one else of his own selection, and who does, in fact, install and maintain the same. An obligation on the part of the lighting company to inspect and maintain the wires and other appliances on the inside of the building necessarily excludes the right of the owner to assume that responsibility himself. Of course, it would be different where the company was employed to put in the appliances and maintain them; for then there would be a continuing duty to exercise proper care to see that they were kept in safe condition. We think it is sound to hold that the owner has the right to have his own building wired, and to contract with the lighting company merely to furnish the electricity; and, under those circumstances, the company is not responsible for the condition of the wires inside of the building. This disposes of any contention of negligence on the part of the defendant in failing to keep the wires insulated.

But it is insisted that there was a special duty resting upon the master to make the working place of the servant reasonably safe, and that this involved the duty to inspect the wires for the purpose of ascertaining whether it was reasonably safe for the servant to work there. It is not correct to say that there is always a duty on the part of the master to make the working place safe. Sometimes that devolves upon the servant himself. Southern Anthracite Coal Co. v. Bowen, 93 Ark. 140, 124 S. W. 1048. And so it is in this case. Byrd was sent there to remove the gas wires and other apparatus from the building. His employer was guilty of no negligence in causing the alleged dangerous condition. It was not guilty of negligence in failing to warn him of the danger of coming in contact with electric light wires; for the plaintiff's evidence shows affirmatively that he was properly warned on that subject, and that he, in turn, warned his helper to observe the same precaution. He knew, in other words, that it was dangerous for the wire which he was removing to be allowed to come in contact with a live electric wire, and it was part of his duty to see that there should be no such contact. Under the circumstances, it was, as before stated, a part of his duty to take the neces-

sary precautions for his own safety, and no obligation rested upon the master to inspect the place in advance and make the necessary repairs, so that he could remove the gas apparatus in safety. The proof in this case fails entirely to show any negligence on the part of the defendant or a failure in the discharge of any duty which it owed to its injured servant. Under the circumstances, the servant assumed the risk of any danger attending the work which he was sent there to perform.

The instruction of the court was therefore correct, and the judgment is affirmed.

PINKLEY v. CHICAGO & EASTERN ILLINOIS RAILROAD CO.

[SUPREME COURT OF ILLINOIS, OCTOBER 28, 1910.]

246 Ill. 370.

1. Master and Servant—Poison—Warning—Knowledge.

A master is not liable for a failure to warn his servant engaged in handling timber recently treated with creosote that the fumes arising therefrom will cause blisters, if the servant is already aware of that fact.

2. Master and Servant—Poison—Warning—Injury.

A railroad company is not liable to an employee directed to unload timbers which had been freshly treated with creosote, the fumes from which poisoned his system and resulted in eczema, where the company neither knew nor by the exercise of ordinary diligence could have known that such injuries were liable to result.

Appeal by defendant from a judgment of the Appellate Court, Fourth District (151 Ill. App. 356), rendered in favor of plaintiff, Samuel A. Pinkley, in an action brought to recover damages for personal injuries caused by poison while in the employ of defendant. Reversed.

For appellant—Brown & Burnside.

For appellee—B. W. Henry, and Albert & Matheny.

COOKE, J. Samuel A. Pinkley, the appellee, brought an action of case in the Circuit Court of Fayette County against the Chicago & Eastern Illinois Railroad Company, the appellant, to recover damages for personal injuries sustained by him while in the employ of appellant. A declaration consisting of two counts was filed, alleging that on August 6, 1907, while appellee was in the employ of appellant as a servant in its supply yards at St. Elmo, Ill., appellant received at its supply yards a car load of green yellow pine piling, freshly treated with creosote; that appellant well knowing the dangers likely to result from handling piling so treated with creosote, through its foreman negligently and carelessly ordered appellee and his collaborators to unload the piling from the car with their hands and

NOTE.

On the subject of Master's Duty to Employee to Give Warning and Instruction, see note in 16 Am. Neg. Rep. 137.

And on the subject generally, see the classification of the "Master and Servant" Cases in Vols. 13-16 Am. Neg. Cas., where the same are reported from the earliest period to 1896.

cant hooks; and plaintiff, having no knowledge of the danger attendant upon such work, and in the exercise of ordinary care, worked with said piling with his hands and cant hooks during the whole of said day in and about unloading the same from the car under the orders and directions of said foreman and by reason thereof became poisoned and diseased and permanently injured. Appellant filed the general issue, and a trial was had before a jury, which resulted in a verdict finding appellant guilty and fixing appellee's damages at \$600. After overruling appellant's motion for a new trial, the court rendered judgment upon the verdict. Appellant prosecuted an appeal to the Appellate Court for the Fourth District, where the judgment of the Circuit Court was affirmed. Appellant was granted a certificate of importance by the Appellate Court, and has brought the case here for review.

At the close of appellee's evidence in chief, and again at the close of all the evidence in the case, appellant offered, and the court refused, an instruction directing a verdict for appellant. The action of the court in refusing to give the peremptory instruction offered at the close of all the evidence is the principal ground urged by appellant for reversal of the judgments of the Appellate and Circuit Courts. Appellant contends that the instruction should have been given, first, because the evidence failed to disclose any negligence on the part of appellant; and, second, because, the appellee assumed risk attendant upon unloading the timbers from the car. In considering this assignment of error, the only question open for our consideration is whether there is in this record any evidence which, with the inferences reasonably to be drawn therefrom, tends to establish these two elements of the case in appellee's favor.

Resolving all controverted facts in favor of appellee, the record discloses that, at and prior to the time appellee sustained the injuries hereinafter mentioned, the appellant maintained at St. Elmo, in this State, supply yards for the storage and distribution of various kinds of material required in constructing and repairing its track and bridges. A number of men were employed in these yards, whose work consisted almost wholly in loading and unloading the material received there. These men worked under the supervision of a foreman. A portion of the material received at and distributed from the yards consisted of timbers covered or treated with a coal-tar preparation containing creosote. On June 3, 1907, appellee commenced working for appellant in the supply yards. He was 52 years of age, and had spent several years in working for railroad companies, but had had no experience in handling material treated with creosote. During the

month of July, 1907, appellant received at the supply yards at least two car loads of timber treated with the coal-tar preparation, which appellee assisted in unloading. He also assisted in unloading one car load of timber so treated. On these occasions he observed that the fumes from the preparation with which the timbers were covered caused a burning sensation, and sometimes caused the skin on the face and arms to blister and peel off; the effect being similar to that of sunburn. Appellee and several of his fellow workmen had been affected in this manner to some extent prior to August 6th while handling material treated with the coal-tar preparation. It was also a common remark among the men employed at the yards that the "Black Jack," as they called it, was "hot stuff," and appellee had heard them speak of it as being "hot stuff."

On the morning of August 6, 1907, the foreman directed appellee and several other employees to unload piling from a coal car which had been received at the yards. The timbers had been recently treated with the preparation, which was soft and viscid, and in that respect differed from the timbers theretofore handled by appellee, upon which the preparation had hardened. It was a very hot day, and the preparation was dripping from the timbers and from the corners of the car the testimony showing that such condition was not unusual when timbers treated with the preparation were exposed to the rays of the sun in hot weather. The foreman furnished a can of vaseline, and advised the men to use the vaseline on their faces, stating that the timbers were green and had been freshly treated, and that he thought the vaseline would prevent the preparation hurting them. The workmen, including appellee, used the vaseline as directed and proceeded to unload the car under the direction of the foreman. They did not handle the timbers with their hands, but each was furnished with a cant hook to use in moving or lifting the timbers. Handspikes were also furnished and used in the work, and after the car had been partially unloaded, and it became necessary to roll the timbers up skids to get them out of the car, a rope was fastened around the timber and a portion of the men pulled on the rope while others remained in the car and assisted with the cant hooks and handspikes. This method of unloading the car on August 6th had been the usual method of unloading large timbers from cars at these yards before and ever since appellee had commenced working there.

Most of the men engaged in the work experienced the burning sensation which they had previously experienced in handling timbers treated with the coal-tar preparation, and some of them had their faces, hands, and arms blistered to such an extent that the skin peeled

off; but all except appellee continued working at the supply yards, and thereafter handled timbers treated with creosote, when called upon to do so, without suffering any injury except the temporary pain and inconvenience from the burning and peeling off of the skin on their faces, hands, and arms. Appellee, however, was unable to sleep during the night of August 6th on account of the pain in his face, hands, and arms, and the next morning his face and arms were red and swollen. He returned to the yards and asked the foreman what kind of work he would be required to perform that morning. Upon being informed that there were timbers treated with creosote to be handled, he refused to go to work, stating that he was already injured enough from handling such timbers. He was thereupon discharged, and another employee was called to take his place. This employee worked a portion of the day and then quit, stating upon the witness stand in this case that he quit because it was too hot for him. He also sustained some burns that day from which he fully recovered within five or six days without consulting a physician. Appellee, after quitting his employment, returned home and applied camphor ice salve to his face and arms. The next day numerous white pustules appeared on his face and arms and in his nostrils, and he consulted a physician, under whose treatment he continued for a period of from three to four months. He then discontinued treatment with the physician, and has since used various proprietary remedies in attempting to be cured, but without success. The burning sensation has been present almost constantly ever since August 6th, and pustules and sores around his mouth and in his nostrils, which at times almost disappear and then break out anew, have caused him great pain and annoyance. The burns on his arms had at the time of the trial healed, leaving scars, and his face was then better than it had been since receiving the injuries.

Dr. Whiteford, the physician who treated appellee, was called as a witness in his behalf, and testified that when appellee first consulted him he was suffering from dermatitis venenata, which the witness described as an irritation of the skin caused by some irritant, in which a redness and swelling and a sense of burning are usually present, and that the trouble had developed into eczema. He further testified that dermatitis venenata could be caused by various substances, and that it would be impossible to tell from an examination of a person the cause of this disease, but that he questioned appellee, and upon learning from him that he had been working with creosote, and that his face had been reddened by it, the witness concluded that creosote must have been the primary cause of the disease. The other medical

testimony also in the case is also to the effect that appellee afflicted with eczema, and that it is a very obstinate disease, not often cured. The medical testimony also shows that creosote is a poison, and that, when highly concentrated and in large quantities it may throw off fumes, which, coming in contact with the membrane of the nose, may cause an irritation thereof, manifesting a reddening of the skin and a burning sensation, and that this irritation may or may not be followed by white blisters or pustules, depending on the individual and the extent to which the tissue is affected; that eczema may develop from any burn or scald, and may be produced by any irritating cause; and that burns from creosote could cause eczema.

The testimony of these physicians with reference to the effect of creosote or creosote fumes upon the human body was to a great extent theoretical. None of them, except Dr. Bohart, a witness for the appellant, were familiar with the preparation used as a preservative for wood, and the composition of the substance used on the timbers does not appear in the record. Dr. Bohart, who resided at the time of the injury and who was familiar with the coal-tar preparation used on the timbers, testified that he was chief surgeon of appellant, and was also surgeon for the New York Central and Lake Shore & Michigan Southern Railroads; that reports of all injuries to men working for appellant were sent to him by the local surgeons; and that this was the first report of poisoning from the preparation received by him or known to his knowledge.

Dr. Whiteford, appellee's physician, testified that he was not familiar with the compound used for treating timbers, but was familiar with the creosote used as a medicine, which is extracted from beechwood, while that used as a preservative for wood is extracted from coal, and that he had seen pure creosote; that he had no experience with the fumes of medicinal or pure creosote burning persons; that he knew of creosote fumes causing burns, and never knew of anyone being injured by the fumes of creosote, unless it was this case. Dr. Higginbottom, another witness called by appellee, testified that he was not familiar with the compound used on timbers, and that his sole experience in treating injuries from creosote was in the treatment of two men whose face and hands had been blistered by using paint containing creosote, and that those cases yielded to treatment. The only other medical testimony introduced by appellant was that of Dr. Greer. He testified that his experience was limited entirely to medicinal (or beechwood) creosote; that he had

burns from it, and had treated patients whose gums had been slightly burnt from the use of beechwood creosote in the mouth.

The record shows that on the same day the appellee received his injuries several men in the employ of the Illinois Central Railroad Company received burns from handling timbers treated with a preparation containing creosote, necessitating medical treatment, but that the injuries of all except one of those men were of a temporary nature and readily yielded to treatment; that in the case of the one excepted his eyes were affected and became sore, and his face and arms were blistered, this condition remaining for about three weeks, and, after being apparently cured, returned the following spring.

It is a matter of common knowledge that creosote is in quite general use as a preservative of timbers used in bridges and as a preservative for poles used by telephone and telegraph companies and by railroads using electricity as a motive power, and the record in this case shows specifically that timbers and poles treated with the coal-tar preparation containing creosote have been for a number of years used by appellant and by the Clover Leaf and the New York Central Railroad Companies and by the Illinois Traction System, and that wooden blocks treated with the preparation are used for street paving in the city of Chicago, some of the men handling these blocks with gloves and others with the bare hands without injury.

The negligent act complained of in this case was the act of the foreman in directing appellee to unload the piling from the car with his hands and with cant hooks. In view of the cause to which appellee attributes his injuries, such act could only be negligent upon proof, first, that the preparation with which the timbers had been treated was poisonous and liable to injure a person engaged in handling the timbers; second, that appellant knew, or by exercising ordinary diligence, might have known, that it was poisonous and capable of producing injury; and, third, that appellee did not know that it was poisonous and likely to injure him, and did not have equal opportunities with appellant of knowing thereof at the time he was injured. *Montgomery Coal Co. v. Barringer*, 218 Ill. 327, 20 Am. Neg. Rep. 68, 75 N. E. 900; *Elgin, Joliet & Eastern Ry. Co. v. Meyers*, 226 Ill. 358, 80 N. E. 897; *McCormick Machine Co. v. Zakzewski*, 220 Ill. 552, 77 N. E. 147, 4 L. R. A. (N. S.) 848.

Such proof would have established a duty resting on appellant to warn appellee of the danger before exposing him to the risk, and, accompanied by proof that such warning was not given, would have established the negligence charged in the declaration. That the preparation and the fumes therefrom were poisonous and did produce the

injuries of which appellee complains must be regarded as established; that the preparation and the fumes arising therefrom were likely to blister the skin, cause the skin to peel off, and produce a burning sensation, and that appellant had knowledge thereof, must be regarded as established; but the record discloses that appellee knew that such injuries were likely to follow from handling the timbers. His counsel, in their argument filed in this court, in discussing appellee's knowledge of the preparation used on the timbers, said that appellee did know that it would smart and burn and cause the skin to blister and peel. But that was and is not the danger complained of. The danger complained of was poisoning of the system, resulting in permanent injury." And: "He did know it would redden and smart and burn and blister—that it was hot stuff; but he did not know it was dangerous in the sense that an abundance of it taken into the lungs and taken into the system would permeate the system and create systematic poisoning; nor did he know that the burning and parching of the skin and mucous membrane would result in eczema." The record in this case, therefore, fails to show any duty owing by appellant to warn appellee, before or after the act of ordering him to assist in unloading the piling from the timbers, of the substance with which the timbers had been treated and of the danger to blister the skin, cause the skin to peel off, and produce a burning sensation, and for such injuries it is clear that appellee could not recover.

Does the fact that the injuries which appellee received were more serious than he anticipated and resulted in a disease of a permanent nature render appellant liable in this case? In our judgment, considering the facts disclosed by the record, it does not. The record shows that appellant, as well as other companies, had been using this preparation for a number of years, and fails to disclose any other than blistering and peeling off of the skin, except in the case of appellee and an employee of the Illinois Central Railroad Company on the same day. Out of about 125 men who had worked for appellant and had handled timbers treated with creosote, appellee was the only one who ever claimed to have been permanently injured by the creosote or creosote fumes. None of the men working with appellant on August 6th suffered any injuries from working with the timbers other than the burning sensation and the blistering and the peeling off of the skin. So far as the record disclosed, appellee was the only person to sustain any serious or permanent injuries from handling timbers treated with creosote during the many years this substance has been in use as a preservative for wood. Under such circum-

a finding that appellant knew, or by exercising ordinary diligence might have known, that the coal-tar preparation was liable to produce the injuries of which the appellee complains, is manifestly without any evidence whatever to support it. If the appellant did not know, or by exercising ordinary diligence could not have known, that such injuries were liable to result, then the law did not impose any duty upon it to warn appellee of the danger of receiving such injuries, before or at the time of giving the order which appellee alleges was negligently given.

A master is not an insurer of the safety of his servant, and he can only be held liable for consequences which he may reasonably be expected to anticipate as a result of his conduct. In *Fent v. Toledo, P. & W. Ry. Co.*, 59 Ill. 349, 14 Am. Rep. 13, in considering the liability of a railroad company for damages from fire caused by sparks from passing engines, we quoted with approval the following language from 2 *Parsons on Contracts* (1st Ed.) p. 456: "Every defendant shall be held liable for all of those consequences which might have been foreseen and expected as the result of his conduct, but not for those which he could not have foreseen and was therefore under no moral obligation to take into consideration." In *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 359, we said that this language quoted from *Parsons on Contracts* would seem to be equally as applicable to actions founded on torts as to those accruing upon contracts. In discussing damages for which a defendant may be held liable and damages for which he is not liable, we said, in *Braun v. Craven*, 175 Ill. 401, 5 Am. Neg. Rep. 15, 51 N. E. 657, 42 L. R. A. 199: "The principle is, damages which are recoverable for negligence must be such as are the natural and reasonable results of defendant's acts, and the consequences must be such as in the ordinary course of things would flow from the acts and could be reasonably anticipated as a result thereof. Proximate damages are such as are the ordinary and natural results of the omission or commission of acts of negligence and such as are usual and might have been reasonably expected. Remote damages are such as are the unusual and unexpected results not reasonably to be anticipated from an accidental or unusual combination of circumstances—a result beyond and over which the negligent party has no control. The law regards only the direct and proximate results of negligent acts as creating a liability against a defendant." There is in this record no evidence tending to show that appellant could reasonably have been expected to anticipate that appellee would be seriously or permanently injured in obeying the order to assist in unloading the piling from the car, and under the principle announced in the foregoing

cases decided by this court the appellant cannot be held liable for those injuries.

A case very similar in principle to the case at bar is that of *Slater Woolen Co.*, 147 Mass. 315, 17 N. E. 531. In that case Frances E. Gould brought an action against the Slater Woolen Company to recover damages for injuries alleged to have been sustained by her in consequence of handling certain cloths purchased from the defendant and which contained certain poisonous dyes. The trial court directed a verdict for the defendant, on the ground that there was no evidence upon which the defendant could be held liable. According to the testimony of the expert witnesses introduced by the plaintiff, it had never been shown until after the plaintiff received her injuries that any case of poisoning had occurred like the present case, and the Supreme Court of Massachusetts, in sustaining the decision of the trial court in directing a verdict for the defendant, said: "All that appears in the plaintiff's case was the first instance of injury of the kind ever was known to arise from the cause alleged in the decision. All that the plaintiff showed against the defendant was that she used an article for dyeing its cloths which was the most common article used in wool dyeing, which was also used very extensively in dyeing stockings black, which, so far as then known, had never caused injury to anybody who merely handled the cloths, and which the defendant did not know or suppose, and had no reason to know or suppose, would be injurious; and under these circumstances, although there was no evidence tending to show that, in point of fact, the plaintiff was injured by merely handling the cloths, this was not a result which the defendant was bound or ought to have contemplated as likely to happen." When the facts in the Gould Case are compared with the facts in the case at bar, the decision of the Supreme Court of Massachusetts is in harmony with the decisions of this court above cited, and is as fitting as an authority that the Circuit Court should have directed a verdict for appellant.

Appellant also complains of the action of the trial court in refusing to modify, and refusing instructions. What we have said in regard to the action of the court in refusing to direct a verdict for the plaintiff will serve as a sufficient guide for the trial court in passing upon the instructions of which complaint is made, should they be offered at another trial of this cause.

On account of the error of the trial court in refusing the peremptory instruction offered by appellant at the close of all the testimony in the case, the judgments of the Appellate and Circuit Courts

reversed, and the cause will be remanded to the Circuit Court for a new trial.

Reversed and remanded.

HAND, FARMER, and CARTER, JJ., dissenting.

TURLINGTON v. TAMPA ELECTRIC CO.

[SUPREME COURT OF FLORIDA, NOVEMBER 21, 1911.]

— Fla. —, 56 So. 696.

1. Negligence—Breach of Duty—Damages.

Where, by virtue of the relation towards each other existing between the law implies a duty from one to the other, a breach of that duty that proximately causes or contributes to causing a substantial injury to another may constitute a cause of action for compensatory damages, if the injured party is free from fault.

2. Negligence—Public Accommodations—Care Required.

Where one undertakes to render a service by furnishing accommodations of a public nature, the law imposes a duty to use proper care, precaution and diligence in providing and maintaining the accommodations in a reasonable condition for the purposes to which they are adapted and are appropriated to be used.

3. Negligence—Public Accommodations—Care Required—Notice.

If accommodations afforded to the public for hire are not reasonably and safe for the purpose for which they may ordinarily and apparently be used in a customary way, the public should be excluded from their use, or notice of their unsuitable or unsafe condition should be so given as to warn persons of dangers in using them.

4. Negligence—Public Accommodations—Damages.

A failure to perform a duty due to the public in furnishing public accommodations may be negligence that, if it proximately results in injury without his fault, will constitute a cause of action for compensatory damages.

CASE NOTE.**Liability of Proprietor of Bathing Resort for Personal Injury to Patron.**

- I. IN GENERAL, 490.
- II. ATTENDANTS OR GUARDS, 491.
- III. CONCEALED DANGERS, 494.
- IV. HOLES, 496.

I. In General.

One who maintains a public bathing resort must be vigilant in keeping the premises safe for his patrons, and he cannot escape liability merely by showing that he did nothing to render the premises dangerous or unsafe. *Dinnihan v. Lake Ontario Beach Improvement Co.*, 8 App. Div. 509, 40 N. Y. Supp. 764 (1896); *Decatur Amusement Park*

Co. v. Porter, 137 Ill. App. 4

A bather at an athletic club slipped upon a slat walk in the dressing room and the bath attendant accidentally put his hand on a glass door which was leaning against the partition at the side of the bath to avoid having water thrown on him by another person in the bath. The bather cannot recover of the defendant because he had leased the premises to the defendant on the ground of absence of negligence. *Heath v. Metropolitan Exhibition Co.*, 11 N. Y. Supp. 100 (1890).

One who constructs a toboggan slide to be used by the public on the ground of an admission fee upon entering the amusement park, is under

Amusements—Bathing Resort—Springboard—Negligence.

Where the relation of a keeper of a body of water and a springboard over it for the use of the public as a diving and swimming place and of a patron for hire of such place exists between two parties, it is the duty of such keeper to exercise proper care, precaution, and diligence to provide and maintain a reasonably suitable and safe springboard, and water of reasonably suitable and safe depth under and about the springboard, free from obstructions or other dangers to comfort and safety in the ordinary and customary use of such diving and swimming place, and, if the place is not reasonably safe, the public should be excluded from its use or appropriately warned of its dangers, otherwise the keeper may be negligent for which an action lies by one proximately injured by the negligence.

Amusements—Bathing Resort—Springboard—Negligence.

Allegations that, owing to the fact that the water under a springboard kept and used for hire as a public diving place was about $2\frac{1}{2}$ feet to $3\frac{1}{2}$ feet deep, in fact constituted a dangerous place to those resorting there for bathing and diving, that the defendant negligently suffered the same to be and remain in the dangerous condition, and that by means whereof the plaintiff's decedent without his fault was injured, state a cause of action.

Amusements—Bathing Resort—Contributory Negligence.

Where the negligence of the keeper for hire of a public diving and bathing place that proximately caused injury to another as alleged is not proven by the plaintiff, or if it appears that the injured person was guilty of contributory negligence, damages cannot be recovered for the injury.

[Headnotes by the Court.]

In error to the Circuit Court of Hillsborough County, to review a judgment rendered in favor of defendant in an action brought to recover damages for injuries received at a bathing resort. Reversed.

For plaintiff in error—McMullen & McMullen.

anticipate and provide against any injuries which may result from defects in the construction of the slide, to the extent that a reasonable and prudent man would foresee the necessity of doing so. *Barrett v. Lake Ontario Beach Improvement Co.*, 174 N. Y. 310, 14 Am. Reg. Rep. 144, 61 L. R. A. 829 (1903). The injury sustained in this case was due to the insufficiency of the railing on the slide.

II. Attendants or Guards.

It is the generally accepted rule that the owner or proprietor of a bathing resort, must make reasonable provision to guard against those accidents to patrons which common knowledge and experience teach are liable to befall

those engaged in sport in which he has invited the public to participate, and that while reasonable provision for the safety of patrons would require attendants or guards to render assistance in case of accident, yet it does not impose upon the proprietor the duty of furnishing a competent or experienced swimmer and diver. *Decatur Amusement Park Co. v. Porter*, 137 Ill. App. 448 (1907). In this instance it appeared that plaintiff's decedent, who was a boy of about 14 years of age, paid the sum of 25 cents for the privilege of swimming and bathing in a lake in the amusement park of the defendant, and while in bathing became strangled and overcome, because of the alleged negligent failure of the pro-

For defendant in error—P. O. Knight.

WHITFIELD, C. J. The plaintiff in error brought this a first count of the declaration being as follows:

“Henrietta R. Turlington, the plaintiff aforesaid, by her McMullen & McMullen, sues the Tampa Electric Company, aforesaid, for that whereas the defendant in the lifetime of E. Turlington, now deceased, to wit, on or about the 4th day of A. D. 1910, was possessed of, using, and operating a certain railroad in and about the city of Tampa, in the county of Hillsborough, and state of Florida, with a line or branch of said railroad extending to Ballast Point, a distance of about 1/2 mile from the said city of Tampa, over which it, the said defendant, ran its cars, and was then possessed of and maintained a park at Ballast Point in the said county of Hillsborough and State of Florida as a place of attraction for its passengers, which was open to the public and lay between its line of railroad and Hillsborough Bay, that there was then in said park a pavilion, which the defendant possessed and maintained, which was also open to the public at which dances and entertainments were occasionally held, and at which drinks of various kinds were sold by said defendant, and that the count of said park and pavilion large crowds of people were constantly visiting said park and pavilion and passing over the grounds of the defendant; that said pavilion extended on the east or side down to the waters of Hillsborough Bay, and that there was built out from said pavilion, over the waters of Hillsborough Bay, a bathhouse which was practically a continuation of said pavilion, which the defendant also possessed and maintained, which was open to the public for bathing and diving, and which was held out to the public as a suitable place for bathing, swimming, and diving.

prietor to have attendants or keepers to watch those in bathing.

The owner of a public bathing beach may be charged with negligence where he places no sign along the beach stating the depth of the water, or places no marks to indicate danger, keeps no one on hand to assist patrons in time of need, and takes no measures to aid a person actually in danger until too late to rescue such person. *Larkin v. Saltair Beach Co.*, 30 Utah, 86, 83 Pac. 686, 3 L. R. A. (N. S.) 982 (1905).

The proprietors of a bathing beach which is opened to the public must let out its privileges for the purpose of being bound to exercise reasonable care for the safety of bathers, and employ some one on guard to watch the bathers and to rescue any in case of emergency. *Brotherton v. Manhattan Improvement Co.*, 48 Neb. 563, 101 Neb. 115, 33 L. R. A. 598, 599, 101 Neb. 709 (1896), affirmed on writ of error in 50 Neb. 214.

But the mere presence of

where bathing suits were rented by the defendant to the public; that extending out from said bathhouse in an easterly or southeasterly direction and constituting a part of said bathhouse was a springboard for diving about 10 feet in length, which springboard was about 3 or 4 feet above the waters of Hillsborough Bay at the time of an average mean tide; that the depth of the water underneath said springboard was at the time of an average or mean tide, about $2\frac{1}{2}$ feet to $3\frac{1}{2}$ feet; that owing to the fact that the water was so shallow underneath said springboard, and where the public were so invited for a consideration to bathe and dive into the waters of Hillsborough Bay, it in fact constituted a dangerous place to those who resorted there for bathing and diving; that on the 4th day of July, A. D. 1910, the said Henry E. Turlington rode to said Ballast Point on the cars of the defendant, and, entering said pavilion, there procured a bathing suit, for a consideration from the defendant, and, having so procured said bathing suit, was then entitled to the privileges of said bathhouse and springboard; that having put on said bathing suit in said bathhouse the said Henry E. Turlington, while in the exercise of due care and prudence, dived headfirst off said springboard into the waters of Hillsborough Bay, and striking his head upon the bottom of said bay, the depth of the water at said time underneath said springboard being only about 3 feet or $3\frac{1}{2}$ feet, broke his neck, after which he languished, suffering untold agony until the 31st day of October, A. D. 1910, upon which date he died as the result of said injury; that there was no sign at or near said springboard indicating the depth of the water, and said Henry E. Turlington had no knowledge of the depth thereof, and no sign warning the public of the danger of diving from said springboard; that the defendant, not regarding its duty in that behalf while it possessed and maintained the said pavilion and bathhouse, wrongfully and negligently suffered the same to be and remain in the dangerous condition aforesaid, by means whereof the said Henry E. Turlington sustained the injury aforesaid

a amusement park, used by a railway company for picnic purposes, does not constitute an invitation to bathe therein, and, in the absence of any invitation or sign, or any visible appliances or preparations for bathing, the proprietor may assume that no one will attempt to bathe in a place of such public character, although the pond may be more secluded than some other parts of the park; and, therefore, the propri-

etor is not guilty of negligence in failing to post a guard or notify the public that they must not bathe, in order to escape liability for the drowning of a boy about 13 years of age, on the theory that the pond constituted a trap and pitfall on account of the sudden variations in the depth of the water. *LeGrand v. Wilkes-Barre and Wyoming T. Co.*, 10 Pa. Super. Ct. 12 (1899).

In an action brought to recover dam-

from which he died; that the plaintiff was the wife of the said E. Turlington, and is now his widow."

"Wherefore the plaintiff brings this action and claims damages the sum of \$50,000."

The second count alleges that drinks were sold and bath suits were rented to the public, and to the decedent, by Addison A. Hackney, a lessee of the defendant; and the third count alleges that bathing suits were rented to the public and to the decedent by the defendant and Addison A. Hackney. In other respects the second and third counts are similar to the first.

A demurrer addressed separately to each count of the complaint was filed; that to the first count being as follows:

"(1) Because the plaintiff has failed in and by said count to state any cause of action whatsoever against the defendant."

"(2) Because said first count contains simply conclusions without any statements of facts from which the court could determine the matter of law that actionable negligence exists."

"(3) Because said first count fails to show any negligent omission or commission upon the part of the defendant, or any agents, servants, or employees, that proximately contributed to the injuries alleged to have been received by the deceased."

"(4) Because said first count shows upon its face that the deceased was a bare licensee, and that the defendant owed no duty to him other than to abstain from willfully injuring him."

"(5) Because said first count fails absolutely to show that the defendant failed to perform any legal duty due and owing to the deceased at the time he received the alleged injuries in question."

"(6) Because said first count shows upon its face that there was no apparent or real danger in using the springboard in question, the deceased having voluntarily and unnecessarily subjected

himself to the drowning of plaintiff's son, who was about 12 years of age, in a swimming pool at defendant's natatorium, the question whether defendant was negligent in failing to provide a sufficient number of competent attendants to guard against accidents to persons using the pool, is one for the jury to determine. *Levinski v. Cooper*, (Tex. Civ. App.), 142 S. W. 959 (1912).

III. Concealed Dangers.

The doctrine laid down in *Decatur*

Amusement Park Co. v. Porter, 100 Tex. App. 448 (1907), is to the effect that it is the duty of a proprietor of a bathing resort, to use reasonable care to keep the bottom of the lake where people bathe, free from everything that may injure the feet of the bathers, and that want of such reasonable care constitutes negligence.

Under the doctrine stated in the preceding paragraph, it has been held that the proprietor of a bathing resort, which entrance was gained up

to this apparent or known danger, and assuming all risks incident thereto by doing this and encountering the same, he proximately contributed to the injuries received by him, and, having done so, his widow, the plaintiff, is precluded from recovering any damages from the defendant.

"(7) Because said first count shows upon its face that the injuries alleged to have been received by the deceased were caused by his own contributory negligence in voluntarily assuming all the dangers connected with and incident to the use of the springboard, and, having done so, nevertheless any negligence upon the part of the defendant, there can be no recovery by the plaintiff in this case.

"(8) Because there is nothing in said first count to show that the defendant had any notice of the defective and dangerous conditions with respect to the use of the springboard, as alleged in said count."

The demurrers to the second and third counts were similar with additions to meet the differences in the allegations. On the sustaining of the demurrer to each count of the declaration, the plaintiff declining to amend, final judgment for the defendant on the demurrer was entered, to which the plaintiff took writ of error, and assigns as error the order sustaining the demurrer and dismissing the action. If the decedent would have had a cause of action against the defendant, had he lived, his widow has a right of action under the statute.

Where, by virtue of the relation towards each other existing between parties, the law implies a duty from one to the other, a breach of that duty proximately causes or contributes to causing a substantial injury to another may constitute a cause of action for compensatory damages if the plaintiff is free from fault. When one undertakes to render a service by furnishing accommodations of a public nature, the law imposes a duty to use proper care, precaution, and diligence in providing and maintaining the accommodations in a reasonably safe

ment of an admission fee, was liable for injuries to a bather caused by stepping upon a splinter of a submerged log. *Wickersham v. DuBois*, 34 App. C. 146 (1909).

One maintaining a bathing resort on the shore of a natural body of water, to which he invites the public, is bound to use reasonable care to keep the bottom under the section of water which the bathers use free from such

substances as glass, and failure to do so imposes liability upon the proprietor, in case injuries result. *Boyce v. Union Pac. R. Co.*, 8 Utah, 353, 31 Pac. 450, 18 L. R. A. 509 (1892).

And in *Bass v. Reitdorf*, 25 Ind. App. 650 (1900), it was held that the owner of a park containing a swimming pool operated for hire, and held out to the public as a suitable place for swimming and bathing, is liable for the

condition for the purposes to which they are adapted, and are entirely designed to be used. If the accommodations for any reason are not reasonably safe and suitable for the purposes for which they are ordinarily and apparently be used in a customary way, the person should be excluded from their use, or appropriate notice of their unsuitable or unsafe condition should be so given as to warn persons of danger in using them. A failure to perform these duties or a failure of them may be negligence that, if it proximately results in injury to another without his fault, will constitute a cause of action for compensatory damages. See *Woodbury v. Tampa Waterworks*, 57 Fla. 249, 49 South. 556, 21 L. R. A. (N. S.) 1034. The relation existing between the defendant and the plaintiff's decedent at the time of the alleged injury was that of a keeper of a public diving and swimming place, and of a patron for hire of such place. The springboard over the water beneath and about it constituted the diving and swimming accommodations. It was in law the duty of the defendant to exercise proper care, precaution, and diligence to provide and maintain a reasonably suitable and safe springboard, and water of reasonably suitable and safe depth under and about the springboard, free from obstructions or other dangers to comfort and safety in the ordinary and customary use of such diving and swimming place. If the defendant was in fact of such a depth as to make diving from the springboard into the water beneath, in the usual, ordinary, and customary manner, unsafe in the particulars alleged, and no appropriate notice or warning was given of the unsafe or unsuited condition of the diving place, and the decedent was, because of such unsafe or unsuitable accommodations being negligently furnished, injured while properly using the accommodations in a customary and appropriate manner in diving from the springboard in the customary way without fault on his part, a cause of action for compensatory damages exists under the statute in favor of the plaintiff, if the decedent could have maintained an action for the same injury had his death not resulted therefrom. Sections 3145 and 3146, General Statutes of 1906.

One who maintains a public resort is required by law to keep

death of a boy caused by striking concealed timbers when he leaped head foremost into the water.

IV. Holes.

Under the rule that one who maintains a public bathing beach must be vigilant in keeping the premises safe for his patrons, it was held in *Dinni-*

han v. Lake Ontario Beach Improvement Co., 8 App. Div. 509, 40 Supp. 764 (1896), that the proprietor of a bathing resort, at which a bathing mission fee was paid, was liable for the death of a 16-year old girl who drowned in a deep hole, which existed for about two years in which bathers were known to fre-

reasonably safe condition for those who properly frequent the place. Where the public is invited to attend a resort, it is the duty of the one who so invites to exercise all proper precaution, skill, and care commensurate with the circumstances to put and maintain the place and every part of it in a reasonably safe condition for the uses to which it may rightly be devoted. A failure to comply with this duty may be negligence; and for an injury proximately caused by the negligence the negligent party may be liable in damages, if the party injured is not guilty of contributory negligence. Where a negligent injury is alleged so as to state a cause of action, contributory negligence is an affirmative and complete defense that may be pleaded and shown in evidence by the defendant. If contributory negligence appears in the case made by the plaintiff, there can be no recovery in the absence of an applicable statute changing the common-law rule denying a recovery to one who proximately contributes to his own injury that is caused by the mere negligence of another.

Where a party maintains a bathhouse or a diving or swimming place for hire, and negligently permits any portion of the same or its appurtenances, whether in the house or the depth of the water, or in the condition of the bottom or things thereon, to be in an unsafe condition for its use in the manner in which it is apparently designed to be used, a duty imposed by law is thereby violated; and, if an injury to another proximately results from a proper use of the same without contributory negligence, a recovery of compensatory damages may be had. See *Larkin v. Saltair Beach Co.*, 30 Utah, 86, 83 Pac. 686, 3 L. R. A. (N. S.) 982, 116 Am. St. Rep. 818, 8 Am. & Eng. Ann. Cas. 7, and notes; *Bass v. Reitdorf*, 25 Ind. App. 650, 58 N. E. 95; *Boyce v. Union Pac. Ry. Co.*, 8 Utah, 353, 31 Pac. 450, 18 L. R. A. 509; *Giggins v. Franklin County Agric. Soc.*, 100 Me. 565, 19 Am. Neg. Rep. 257, 62 Atl. 708, 3 L. R. A. (N. S.) 1132; *Barrett v. Lake Ontario Beach Imp. Co.*, 174 N. Y. 310, 14 Am. Neg. Rep. 144, 66 N. E. 968, 1 L. R. A. 829; *Wickersham v. Dubois*, 34 App. D. C. 146; *Decatur Amusement Park Co. v. Porter, Adm'r*, 137 Ill. App. 448; *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563, 1 Am. Neg. Rep. 115, 67 N. W. 479, 33 L. R. A. 598, 58 Am. St. Rep. 709.

The declaration here expressly alleges that the bathhouse was assessed and maintained by the defendant, which was open to the

There was a sharp conflict in the testimony as to whether there was a rope to keep bathers from going beyond the edge of the beach where bathers were expected to remain.

But a municipal corporation which is required by statute to establish and maintain a free bathing beach, if liable for the uneven condition of the beach, cannot be held responsible until

public for bathing and diving, and which was held out to the public as a suitable place for bathing, swimming, and diving, and that bathing suits were rented by the defendant to the public, and that extending out from the bathhouse and constituting a part of the bathhouse was a springboard for diving, which springboard was 3 or 4 feet above the waters of Hillsborough Bay at average low tide; that the depth of the water under the springboard at average mean tide about $2\frac{1}{2}$ to $3\frac{1}{2}$ feet; that owing to the fact that the water was so shallow underneath said springboard, and that the public were so incited for a consideration to bathe and dive in the waters of Hillsborough Bay, it in fact constituted a dangerous place to those who resorted there for bathing and diving; that the defendant for a consideration procured a bathing suit, and, while in the absence of due care and prudence, dived headfirst off said springboard into the waters, and, striking his head upon the bottom of the bathhouse, the depth of the water underneath said springboard being at low tide only about 3 feet or $3\frac{1}{2}$ feet, broke his neck; that there was no sign at or near said springboard indicating the depth of the water; that the decedent had no knowledge of the depth thereof, and no sign warning the public of the danger of diving from said springboard; that the defendant, not regarding its duty in that behalf while it possessed and maintained the bathhouse, wrongfully and negligently suffered the same to be and remain in the dangerous condition aforesaid, and whereof the decedent sustained the injury from which he died. In substance, it is urged that the declaration does not state a cause of action because no actionable negligence of the defendant is shown, and because the plaintiff appears to have directly contributed to his own injury. It is argued that the allegation is in effect merely that the defendant maintained a springboard in good condition over a body of water $3\frac{1}{2}$ feet deep, and that this is not actionable negligence. The facts stated are that owing to the fact that the water was only at the stated depth under the springboard it in fact constituted a dangerous place to those resorting there for bathing and diving, that the defendant negligently suffered the same to be and remain in the dangerous condition, and that by means whereof the decedent without fault was injured. These are allegations of fact admitted by the defendant and sustained by other allegations that do not as matter of law

it has completed the work of construction and thrown the beach open to the public for the use contemplated. The court said that we do not understand that a municipal corporation, even

if the duty has been imposed of establishing and maintaining a beach, can be held responsible for its safety and the safe use of the beach by those who are likely to have

be nonactionable either for lack of negligence proximately causing the injury, or because of contributory negligence. If this condition of the bathhouse was in fact not dangerous, or if it was not properly used so as to make the decedent guilty of contributory negligence, it is a defensive matter of averment and proof. If negligence of the defendant that proximately caused the injury as alleged is not shown by the plaintiff as the law requires, or if it appears that the decedent was guilty of contributory negligence, the plaintiff will not be permitted to recover damages. These principles are applicable to the second and third counts of the declaration. The allegations of the second count as to Addison A. Hackney are merely that drinks were sold at the pavilion by Addison A. Hackney, a lessee of the defendant; that the "bathing suits were rented to the public by one Addison A. Hackney, a lessee of the defendant;" and that decedent procured a bathing suit for a consideration from the said Addison Hackney, a lessee of the defendant." It is specifically alleged in the second and third counts that the bathhouse was "possessed and maintained" by the defendant. The judgment is reversed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER and PARKHILL, JJ., concur in the opinion.

it, in the same manner as streets and highways are to be rendered safe, even as parks and grounds kept for entertainment and amusement, without direct profit or advantage to the

municipality, might have been maintained in a condition of safety. *McGraw v. District of Columbia*, 3 App. D. C. 405, 25 L. B. A. 691 (1894).

SOUTHERN RAILWAY CO. v. VALENTINE

(SUPREME COURT OF APPEALS OF VIRGINIA, MARCH 14, 1911)

113 Va. 388.

1. Railroads—Crossing—Duty to Look and Listen.

It is the duty of one driving along a highway which crosses a railroad track to look and listen before driving upon the track and to exercise due care to make the act of looking and listening effective.

2. Railroads—Crossing—Contributory Negligence.

One who drives upon a railroad track at night at a familiar crossing at which an approaching train is visible for a distance of 100 yards, without exercising due care, is guilty of such contributory negligence as will bar a recovery of damages for the death of the driver.

In error to the Circuit Court of Mecklenburg County, the judgment rendered in favor of the plaintiff in an action to recover damages for the death of plaintiff's decedent by the negligence of the defendant. Reversed.

For plaintiff in error—Williams & Tunstall.

For defendant in error—Faulkner & Faulkner, and Chas.

BUCHANAN, J. This is an action brought by the personal representative of Tinker Valentine against the Southern Railway Company to recover damages for causing the death of the decedent by the alleged negligent running of one of the railway company's trains.

It appears that between the hours of 11 and 12 o'clock on the morning of July 20, 1907, the plaintiff's intestate left a church, where he was last seen alive, for his home, in a top buggy, with curtains drawn by a gentle horse. The next morning, near a highway crossing the railway near the end of the ties and the dead body of his intestate were found his dead body and broken buggy on the north side of the railway near the end of the ties and the dead body of his intestate on the opposite side of the track. The evidence tends to show that the death of the deceased and the destruction of his property were caused by the negligence of the defendant.

NOTE.

On the subject of Collision of Trains with Teams at Crossings, see note in 18 Am. Neg. Rep. 323.

On the Doctrine of "Stop, Look and Listen," see note in 9 Am. Neg. Rep. 408.

And on the subject of the Liability of Railroad Company for Accidents at Crossings, see note in 11 Am. Neg. Rep. 117.

And on these subjects generally, see Vols. 11 and 12 Am. Neg. Rep. "Collision and Crossing Cases."

by the railway company's passenger train, which passed over the crossing about 1 o'clock that morning. There was no eyewitness to the accident. The engineman of the railway company, who was a witness for the plaintiff, knew nothing of it, except that some hours after passing the crossing he found blood and hair on the pilot of his engine. He further stated that his engine, which was running 35 or 40 miles an hour, was equipped with an electric headlight, and that he saw no one as he passed the crossing. He also testified that the whistle was sounded and the bell rung for the crossing. This latter statement of his is contradicted by several witnesses, who testified positively to the contrary.

The contention of the plaintiff is that the failure on the part of the railway company to give the statutory warning as its train approached the crossing, and to keep a proper lookout for the crossing (as he claims) was sufficient evidence of negligence to sustain the verdict of the jury. The railway company, on the other hand, insists that, even if this were true (which it denies), the facts and circumstances disclosed by the record show that the plaintiff's decedent was guilty of contributory negligence.

It appears that the crossing is between $1\frac{1}{2}$ and 2 miles west of South Hill, a station on the railway company's road. From that station the highway over which the deceased traveled in going to his home ran not far from the railroad. From a point within 200 yards of the crossing trains approaching from South Hill can be plainly seen. After passing that point, which is on the summit of a cut, or "bump," as it is sometimes called by the witnesses, the highway and railroad approach each other, and when about 100 yards (295 feet) east of the crossing until the crossing is reached they are only a few feet from each other, and the ground between the two is about level. It does not appear very clearly how far from the eastern end of that 100 yards, near which there is a curve in the railroad, a train can be seen approaching from South Hill, but some short distance at least. From South Hill to within about 100 yards of the crossing, the railroad is upgrade, and from there to the crossing is downgrade.

When near or at the edge of the crossing, a train can be seen approaching from the east about 100 yards. One witness testified that you could not, when travelling along said 100 yards in a vehicle, hear

several States and Territories and the Federal and Supreme Courts of the United States, from the earliest period to 1896, are reported and classified and arranged in alphabetical order of States

and for subsequent cases to date see vols. 1-21 *Am. Neg. Rep.*, and this volume (1 *N. C. C. A.*) and succeeding volumes of *Negligence and Compensation Cases Annotated*.

a train coming from the east, "unless it blows mighty loud right at you." The witness did not attempt to explain why the approach of a train cannot be heard there, and there is no evidence which does tend to explain it. Be that as it may, it is that, if the deceased had been exercising ordinary care, the accident would not have happened. His home, where he had lived for some time, was within a mile or two of the crossing. He was acquainted with the crossing and the conditions there, and is held to have known, as are all travelers, that the railroad crossing the highway is a proclamation of danger, and that he must listen for approaching trains before attempting to cross. It was only his duty to look and listen before going upon the crossing to exercise ordinary care to make the act of looking and listening effective. *Washington So. Ry. Co. v. Lacey*, 94 Va. 460, 2 Am. 266, 26 S. E. 834.

All, or nearly all of the witnesses who testified that the train did not give the statutory warning as it approached the crossing, testified that the whistle did blow when at South Hill. Those who testified that the deceased was west of the crossing, and, therefore, farther from South Hill than the deceased. When within 200 yards of the crossing, he could have seen a train approaching from South Hill; and when within 100 yards of the crossing he could have seen it a short distance back of the crossing. At the edge of the crossing he could have seen its approach away. It seems to us clear, under the facts and circumstances disclosed by the record, that the plaintiff's intestate was not negligent in the exercise of ordinary care when he drove upon the railroad crossing. *Eastern Ry. Co. v. Hansbrough*, 107 Va. 733, 745, 746, 60 S. E. 511.

The judgment complained of must be reversed, the verdict set aside, and the cause remanded to the Circuit Court for a new trial. **Reversed.**

**THE GRAND TRUNK RAILWAY COMPANY OF CANADA v.
GRIFFITH et al.**

[SUPREME COURT OF CANADA, DECEMBER 6, 1911.]

45 Can. Sup. Ct. Rep. 380.

Roads—Negligence—Death from Collision with Train—Absence of Witness—Presumption.

In an action brought to recover damages for the alleged negligent death of plaintiff's decedent, the jury is justified, after considering the balance of probabilities and drawing inferences from the circumstances proved, in finding favor of the plaintiff on evidence which shows that the deceased left his place of employment about 5:30 P. M., on the 29th day of December, and that about an hour later his body was found some 250 yards east of the point where the road crosses the railroad tracks which he was in the habit of taking instead of walking along the tracks with other workmen; that no witness saw the accident; that two trains running on parallel tracks passed each other a little distance east of the crossing, on one of which the bell was ringing, but on the other bound train the bell was not ringing; and that the train running without giving any warning could not be seen by one approaching the tracks until close to the crossing.

Appeal by defendants from a decision of the Court of Appeal for Ontario, sustaining the verdict of a jury rendered in favor of plaintiff in the trial of an action brought to recover damages for the alleged negligent death of plaintiff's decedent caused by contact with a train at a railway crossing. Appeal dismissed.

For appellants—D. L. McCarthy, K. C., and W. H. Biggar.

For respondents—W. M. McClemont.

NOTE.

On the Doctrine of "Stop, Look and Listen," see note in 9 Am. Neg. Rep.

And on the subject of the Liability of a Railroad Company to Pedestrians Struck by Trains at Crossings or While Crossing Railroad Tracks, see note in 10 Am. Neg. Rep. 234.

And on the subject of the Liability of a Railroad Company for Accidents at Crossings, see note in 11 Am. Neg. Rep.

And on these subjects, generally, see

Vols. 11 and 12 Am. Neg. Cas., where the topic of "Collisions and Crossings" is covered, comprising the decisions from the earliest period to 1896 in all the States and Territories and the Federal and Supreme Courts of the United States, classified and arranged in alphabetical order of States, together with notes of English cases, and for subsequent cases, see Vols. 1-21 Am. Neg. Rep., and this volume (1 N. C. C. A.) and succeeding volumes of Negligence and Compensation Cases Annotated.

THE CHIEF JUSTICE. Assuming that Griffith was run down and found by the jury, at the level crossing on Kenilworth Avenue, was there in the exercise of his right to cross the railway at the place made and provided by the company for that purpose. A trolley car comes to the same place with a right to cross that highway. It is the subject, however, to the statutory duty of observing certain precautions with respect to the use of the bell and whistle. There was a failure to perform that statutory duty. The bell was not rung and an accident resulting in the death of the deceased happened. There can be no doubt that, on these facts, a jury might say that negligence on the part of the company ought to be inferred. *Grand Trunk Ry. Co. v. Hainer*, 36 Can. S. C. R. 180; *North Eastern Ry. Co. v. Wainwright*, 7 H. L. 12.

The answer of the company is that the deceased was also guilty of negligence in that he failed to take the precautions which common prudence suggested as he approached this admittedly dangerous crossing. For twenty-five yards before reaching the track, Griffith, who was in the circumstances to exercise reasonable care, was in a good view of the track and could see and hear the train approaching. He was alert as he should have been. It is quite true that the approaching train might have been seen by the deceased as he came to the track, if there was no obstruction, and noise of the train might have given him warning if nothing interfered. But the train which caused the accident was, as I read the evidence, shut out from his view by a freight train going the opposite way—the track being double track at that point—and the noise of the train approaching the crossing, and which admittedly caused the accident, might well be confounded with the noise made by the train going in the other direction and from which there was no danger to apprehend. Under these circumstances the question is:—Ought the jury to infer, as they did, that the accident was caused by the absence of the statutory signal rather than by the failure, on the part of the deceased, to distinguish, in the confusion of noises caused by both trains, something to warn him of the approaching train and which warning he failed to observe? I think not. In view of the opinions expressed in the *Dublin, Wicklow & Wexford Ry. Co. v. Slattery*, 3 App. Cas. 1155 [16 Am. Neg. Cas. 9n], we should not be justified in interfering with the verdict. In a note referring to that case, Sir F. Pollock goes so far as to say “that their Lordships did not conceal their opinion that the verdict was a perverse one.” We do not think that such criticism might fairly be applied to the verdict in the present case.

I would dismiss the appeal with costs.

DINGTON, J. There was such evidence of facts and circumstances tending to prove the respondent's case that they were entitled to have submitted to the jury.

It is not necessary in any such case to have the evidence adduced to demonstrate that a jury must find a verdict.

In a great majority of cases similar to this men may reasonably differ in regard to the conclusion to be reached.

We are asked to make a ruling in this case that would absolutely prevent recovery in any accident case unless it was supported by the evidence of eye witnesses.

I do not say that counsel presenting his case fairly, as usual, in so many words asks us so to rule.

But I do say, that the logical result founded upon the various arguments put forward would be that.

No one who has heard or read many of these cases arising from some person having been killed at a railway crossing can fail to have often doubted whether or not under the given circumstances in which the deceased person was placed at the time of the accident, he or she could have heard the statutory warning if given. It may in a small percentage of such cases be that the person killed was stone deaf or hopelessly drunk and from that or other like proof, courts and juries could be debarred from drawing the inferences they do draw in such cases.

Assuming the person killed possessed of the ordinary human faculties and of the reason and sense springing from the use of such faculties, courts and juries do infer the use thereof has been made, as a matter of self-preservation.

Given the proof that no statutory warning was given, they go a step further and infer that if such warnings had been given, the needed care would have been taken, and the accident have been averted. I may doubt in any such case if the absolute truth has been reached. However, I can see nothing wrong in law or sense in that mode of reasoning.

In this case where the man killed was one who, as a matter of preparation, habitually took a longer road than he might, and thus spent fully twenty minutes more than his neighboring fellow-workmen, in going to and returning from his work, this mode of reasoning seems peculiarly apt.

I was a member of this court when we dismissed the appeal in the Grand Trunk Ry. Co. v. Hainer, 36 Can. S. C. R. 180, and I certainly think this well within what was decided there.

No two cases will ever present exactly the same facts and stances.

The same confusion arising from coming and passing trains have operated there as here. The unfortunates in either case not in fact have been any better off had the law been observed.

Human insight is so limited that reaching absolute truth in to anything in everyday life relating to any accident is almost impossible. We must strive to reach as near as we can to the truth, without being either too self-confident or bold and presuming to or conjuring up as timid men do sometimes, more or less doubts to avoid responsibility.

This case seems to have been most fairly tried and I can find no reason to complain of the result reached.

I am glad to find from the learned trial judge's charge that there is no appeal to passion or prejudice.

I agree in the mode of reasoning which the several learned judges supporting the verdict and judgment have applied to the case.

I should not indeed have added a word but for the strong argument made for appellant and for support of which, I think, expressions of high legal authorities can easily be found, but which is not maintained by the great general mass of authoritative opinion on the subject.

I think the appeal should be dismissed with costs.

DUFF, J. The body of the deceased, James A. Griffith, was found beside the railway track of the appellants, the Grand Trunk Railway Company, near Hamilton, about an hour after he left his place of work for his home on the evening of the 29th December, 1909. In the trial of the action (brought by the respondents, Griffith's widow and children) out of which the appeal arises, the jury found that Griffith had been run down by an eastbound passenger train of the appellants, the Kenilworth Avenue crossing about 350 yards west of the place where his body was found and that the accident was due to the negligence of the appellants' servants in not giving the statutory signal when the train approached the crossing. It is not denied that Griffith was due to his being struck by the train in question, but the case is impeached in two respects: 1st: That there is no evidence leading to the conclusion that Griffith was at the crossing when he was struck down; and, 2nd, there was none from which it could be determined with any reasonable certainty that Griffith was in collision with the train as the result of this default on the part of the company's servants.

It will be convenient to deal first with the second ground of appeal and for the purpose of dealing with it I shall assume that the deceased was crossing the track at Kenilworth Avenue, when he met his path; and that as the east-bound train approached the highway the bell of the locomotive was not ringing as the statute requires. The question arising on this topic is whether the plaintiff has shown facts which justify the inference that Griffith's presence on the eastbound track at the moment he was struck by the train was due to the fact that the statutory signal referred to was not given?

Before examining the facts with a view to answering this question there are two general observations which I think ought to be made. The first of them is this. When a plaintiff in such a case as this proves facts justifying the conclusion that the default of the defendant has materially contributed to the accident in the sense that without that fault the accident would not have happened he thereby establishes a *prima facie* case—unless the facts disclosed fairly and reasonably allowed make it impossible in the absence of further evidence to escape the conclusion that the negligence of the injured person has also been a factor in producing the harm complained of.

I dwell upon this because I think the able and interesting argument of Mr. McCarthy did to some extent involve the fallacious assumption that the plaintiff must as a necessary element in his case exclude the hypothesis of the victim's contributory negligence. The plaintiff must show that if he cannot connect the injury complained of with the defendant's negligence without at the same time proving facts which no reasonable tribunal could hold to be consistent with the absence of contributory negligence on the part of the victim; but he is entitled to succeed if he convinces the jury on facts reasonably leading to that conclusion that the defendants' negligence has materially contributed to the mishap and if at the same time the jury may reasonably find and do find that the defendants have failed to discharge the onus placed on them to show that there has been such contributory negligence. This appears to me to be quite conclusively demonstrated by the judgment of Lord Watson in *Wakelin v. London & S. W. Ry. Co.*, 3 App. Cas. 41, at p. 46, in which Lord Blackburn concurred, and by the judgments in the *Dublin, W. & W. Ry. Co. v. Slattery*, 3 App. Cas. 55 [16 Am. Neg. Cas. 9n], which Lord Watson mentions.

I will not put in my own words the second observation; but will quote the words of the Lord Chancellor in *Richard Evans & Co. v. Bentley*, A. C. 674 (1911), at p. 678:—

"It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will

suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate the probability of his case. If the more probable conclusion is that for which he contends and there is anything pointing to it, then there is evidence for the jury to act upon. Any conclusion short of certainty may be misadventure or surmise, but courts, like individuals, habitually act on the balance of probabilities."

It is quite unnecessary, doubtless, to say so—but if it should be supposed that the principle thus stated by the Lord Chancellor involves any new departure all doubts on that point may be allayed by referring to Lord Cairn's judgment in *Dublin, W. & W. Ry. v. Slattery*, 3 App. Cas., at pages 1166 and 1167, Lord Selborne's judgment in the same case, at pages 1190 and 1191, and Lord O'Connor's judgment at page 1184; to the judgments of Lord Esher, in *Smith v. Kay L. JJ.*, *Smith v. South Eastern Ry. Co.*, 1 Q. B. 178, at pages 183, 185 and 188, Lord Herschell, in *Peart v. Grand Ry. Co.*, 10 Ont. L. R. 753, as well as to the judgments of the Committee of the Privy Council in *McArthur v. Dominion Coal Co.*, A. C. 72 (1905), [Lord MacNaghten] at page 73, and in *Ry. Co. v. King*, A. C. 260 (1908), [Lord Atkinson] at page 261 et seq.

In this case the relevant facts in evidence are—I am proceeding on the assumption above mentioned—that there were two tracks crossing in question; that at the time the accident occurred, at about half past six o'clock of a December evening, two trains were approaching the crossing, one eastbound on the south track and the other westbound on the north track and these trains met and passed each other immediately after the eastbound train had cleared the crossing. At the time the train approaching from the east the bell was ringing, on the north track the bell was not ringing. It is important to add that as Griffiths was walking south came to the railway line his view towards the west was completely cut off by a high fence until he reached a point twenty-five feet north of the line and that after reaching that point his vision in both directions both the right and the left was unobstructed. The first question for the jury to decide is whether from this state of facts the conclusion can be fairly deduced that the accident would not have happened if the bell had been rung.

I think the jury might properly consider that as Griffiths was walking towards the crossing he would see the westbound freight train and hear the bell and that until he passed the fence on his right he could not see the eastbound passenger train; and that hearing no bell from the east he would be thrown off his guard in respect of trains app

from that side and would naturally give his attention exclusively to the train he both saw and heard on his left.

It is clear that if after Griffith had passed the fence which was on his right he had glanced along the line westward from that side of the crossing he must have seen the eastbound train; and on the hypothesis that he did so, it is equally clear it would be impossible to justify the conclusion that the failure to ring the bell had anything to do with his death. If the deceased saw the passenger train and either rashly attempted to cross in front of it or was led to attempt to cross in front of it or was led to attempt to cross by his own error in miscalculating the position or speed of the train—in either case there could be no ground for connecting the failure to ring the bell with the accident; and the important question appears to be whether the jury could properly infer that the eastbound train was not observed by the deceased until all events it was too late to enable him to save himself. I think they might do so. I think they might properly consider that in the circumstances hearing no bell from the east and having his vision in that direction obstructed by the fence on that side while the freight train at the same time was in full view west of the crossing, he not unnaturally might and probably did proceed without thought of possible danger from the opposite direction.

The other hypothesis—that seeing the eastbound train he was led into attempting to cross by an error of judgment as to the position or speed of the train might no doubt, considered in itself, be a possible explanation of what occurred. But I do not think the examination of these two rival hypotheses could properly be withdrawn from the jury. They presented a question for the jury in my opinion for this reason. The first proceeds upon the theory that that happened which in the ordinary course of events would be likely to happen as the result of the failure to ring the bell assuming Griffith to have acted in a way in which according to common experience the jury might reasonably consider it unlikely that an ordinary person having experience of the railway practice respecting signals for highway crossings would act. The other involves the assumption that Griffith acted in a way in which the jury might properly think only a very rash man would act. I think the plaintiff having thus connected the accident with the fault of the defendants by proving such negligence on their part as was calculated according to the common course of experience to result in just such an eventuality as that which happened in fact it was for the jury to consider the weight of any suggestion that the victim brought disaster upon himself by an attempt to do something in itself extraordinary or something which in the particular circumstances the jury

would be entitled to think an ordinary person would be un-
do. The plaintiff's case appears to be in that position and
think is sufficient to bring it within the principle stated by the
Chancellor and already quoted.

Each of the cases referred to above affords an illustration
method of dealing with such questions. In *Slattery's case*
W. & W. Ry. Co. v. Slattery, 3 App. Cas. 1155, 16 Am. Neg. C.
the victim had been killed while attempting to pass in front of
which he could not have failed to see if he had looked in the
from which it was approaching. Nobody knew whether he
train or not. There was evidence from which the jury might
ferred that he knew it was the practice of trains before pas-
locality in question to give warning of their approach by w-
and there was evidence that at the moment of crossing he w-
preoccupied state of mind. The majority of the Law Lords h-
be a question for the jury whether he was put off his guard
failure of the train to whistle or whether on the other hand
the train but rashly or through excusable error of judgment at-
to pass before it. In *Smith v. South Eastern Ry. Co.*, 1 Q. B.
(1896), nobody knew whether the victim had or had not seen the
which ran him down; but the practice was (as the man who w-
might be supposed to know) that when a train was approach-
crossing at which the accident occurred the gate-keeper stood
and informed the driver by signal whether or not the line was
and the train which caused the death of the victim passed the
immediately after he had left the gate-keeper sitting in his
It was considered by the Court of Appeal that from these
stances the jury might infer that the victim had been led into
of security by his knowledge that the gate-keeper was not at
customed post when a train was about to pass and that he h-
seen the train until it was too late to escape. In *Toronto Ry.*
King, A. C. 260 (1908), there is another example of a similar
of reasoning. In *Dominion Cartridge Co. v. McArthur*, A. C.
(1905), the injury complained of arose from an explosion in
ridge factory. One of the machines had defects which might
been expected to lead to such an explosion, notwithstanding
absence of any carelessness on the part of the victim who at the
of the explosion was engaged in working it. There was no sug-
of negligence on his part, and it was held to be a proper infer-
that the explosion arose from the defects proved. I may add
Crouch v. Pere Marquette, recently decided in this court (where
shown that the signals given by a train approaching a highway

calculated to mislead and that the signpost had been removed from the crossing), it was held that the jury might infer that the death of the victim, a traveller on the highway, was due to his being misled by the signals or deceived as to the point at which the track crossed the highway; and that it was for them to say whether the rival suggestion that the victim's horse had taken fright when approaching the railway line was to be accepted or rejected.

If the jury considered the weight of probability to favor the conclusion that Griffith did not see the passenger train in time to escape it, then it seems clear that the question of contributory negligence could not be withdrawn from the jury. The considerations to which the majority of the Law Lords give effect in *Slattery's case*, *supra*, and which prevailed in *Smith v. South Eastern Ry. Co.*, 1 Q. B. 178 (1896), and in *Toronto Ry. Co. v. King*, A. C. 260 (1908), appear to be entirely applicable.

I quote in *extenso* two passages from the judgments in *Smith v. South Eastern Ry. Co.*, 1 Q. B. 178 (1896). At pages 185 and 186 Lopes L. J. says:—

"Then it was said that this case fell within the authority of *Wakelin v. London & S. W. Ry. Co.*, 12 App. Cas. 41, because the circumstances under which the deceased came by his death were not known, and that the evidence given for the plaintiff was at the best equally consistent with the death of the plaintiff's husband having been caused by his own negligence as with it having been caused by the defendant's negligence. It was said that the train carried lights, that it could be seen more than 600 yards off, and that the driver sounded his whistle; and, therefore, that the deceased man must have been guilty of contributory negligence by reason of the reckless way in which he crossed the line. Of course, if that could be established, the argument which the defendants' counsel based upon *Wakelin v. London & S. W. Ry. Co.*, 12 App. Cas. 41, might be sustained. The question is whether on this point the case could have been withdrawn from the jury. Can it be said that the evidence was equally consistent with the view that the death of the plaintiff's husband was caused by his own negligence as with the view that it was caused by the defendants' negligence? I have felt some difficulty on this point; but on consideration the case strikes me in this way. The deceased appears to have known the crossing and the practice with regard to signalling of trains. Was it not a question for the jury whether the deceased, finding that the signalman remained sitting at his lodge and was making no attempt to signal any approaching train, might not reasonably have supposed that he could safely cross the rails without taking the precaution of

looking up and down the line or listening for the whistle of a train. On consideration I have come to the conclusion that on this question there was evidence for the jury, and, if I had been trying the case, I do not think I could have withdrawn it from them."

The observations of Lord Esher at pages 183 and 184 are to the same effect:—

"The deceased man lived in the neighborhood, and had been crossing on previous occasions. I think there was evidence which the jury might infer that he knew that Judges had to perform the services which I have mentioned for the company, when a train was passing over the crossing; and, that being so, they are on the evidence, take the view that, under the circumstances, it was not a want of reasonable care on the part of the deceased to perform that, as Judges remained in his house, no train was coming, and therefore, he might go over the crossing in safety without taking the precaution of looking up and down the line, or any other such precaution as might otherwise be necessary. If that be so, there was evidence for the jury upon the question whether there was any want of reasonable care on his part. In saying this, I think I am adopting the view expressed by Lord Cairns in the case of *Dublin, W. & G. Co. v. Slattery*, 3 App. Cas. 1155 [16 Am. Neg. Cas. 9n]. He said in that case to have thought that, if a man had a right to suppose that, from his knowledge of the practice at the station that an approaching train would whistle, the jury might come to the conclusion that the sound of whistling had thrown him off his guard, and had produced in him a state of mind in which he might not unreasonably suppose that it was unnecessary for him to look out before crossing to see whether a train was coming. So here, I think, in the case of a man who followed the practice at the crossing, the jury might say that the fact that a signalman remained in his house produced in his mind a sense of security which would prevent its being a want of reasonable care on his part to look up and down the line to see whether a train was coming. Therefore, without entering into all the questions which have been discussed during the argument, I think the considerations which have been mentioned are sufficient to determine this case, and to entitle the judge at the trial to decline to withdraw the case from the jury."

The remaining question stands thus. There was evidence which the jury might conclude that Griffith habitually avoided the railway. There is no reason for supposing that on the occasion of the accident he did not follow his usual practice except the fact that his body was found a considerable distance from the crossing. The question whether the situation of the body was so inc

th the supposition that he was on the crossing when he was struck to lead to the inference that he was killed while walking on the track or to leave the whole matter too doubtful to justify any conclusion upon it was a question of fact which could not be withdrawn from the jury; and I think it is quite impossible to say that their verdict on this point was an unreasonable one.

ANGLIN, J. The defendants appeal from the judgment of the Court of Appeal for Ontario upholding a verdict against them for damages for the death of the plaintiff's husband. The plaintiff's case was that, while lawfully crossing the defendant's railway track on Kenilworth Avenue in the City of Hamilton in returning from his work to his home on the evening of the 29th December, 1909, her husband was struck and killed by a train of the defendant company which had failed to give the requisite statutory warning of its approach, and that this omission of duty was the cause of the accident.

At the trial and in the Court of Appeal the defendants contended that it was not established by the evidence whether the deceased had been killed by the train in question or by a train which had gone over the crossing shortly before, as to which no proof of breach of statutory duty had been given. The jury found against the appellants upon this point; the Court of Appeal confirmed the finding; and it was expressly accepted by counsel for the appellants at bar in this court.

In support of their appeal the defendants now take two grounds; first, that there was no evidence to sustain the finding that the deceased when struck by the train was on the highway crossing; and secondly, that, although the omission of the statutory signal had been proved, upon the evidence it was a mere surmise or conjecture and not a legitimate inference that this was the cause of the accident.

There was no eyewitness of the accident. The train which must now be taken to have struck the deceased was travelling in an easterly direction. His body was found some 350 yards to the east of Kenilworth Avenue crossing; his dinner can and a mitten were picked up some fifty yards farther west than the body, and at the latter point there were also found traces of blood and hair upon the rails. There was no evidence of any indicia of the accident nearer to the crossing. Several of the plaintiff's fellow-workmen testified that it was his habit in returning to his home not to walk along the railway as other workmen did, but to cross it at Kenilworth Avenue. He was never known to have followed the railway track in going home. There was no evidence by two of his fellow-workmen, who, on the night in question, were walking home along the railway track, that, at a point

about 110 yards to the west of Kenilworth Avenue, they were taken by the train which killed the deceased, and that looking at the track they did not see any person on the railway right of way at the crossing or beyond it. The plaintiff also stated in evidence that she had warned her husband of the danger of walking upon the tracks and that he had assured her that he never did so. I, however, reject this latter piece of evidence from consideration, as I think its probability very doubtful.

Having regard to the other evidence to which I have alluded, and to the fact that it should not be assumed that an illegal act of trespassing upon the railway right of way would have been committed by the deceased, would a jury be justified in inferring that he was on the crossing when struck by the train; or does the fact of his body being found 350 yards east of the crossing preclude such inference? Had the body been found only a few yards from the crossing, the jury's finding could not, I think, have been questioned. The fact that the deceased was carried some distance by the engine is manifest from the fact that his can and mitten were found 50 yards near the crossing rather than his body. That the bodies of men and of animals killed by railway engines are sometimes carried by them for considerable distances is well known. There was no evidence given of the condition of the body or in its position with regard to the railway tracks when found which would indicate whether it had not been carried any considerable distance. In these circumstances, I think, it was, for the jury to determine what weight should be attached to the fact that the body was found where it was. It was not to say whether, it being clear that the body had been carried some distance, it was reasonable in the circumstances to infer that it had been carried the whole 350 yards. It was within their province to decide whether the inference that the deceased had followed his usual course in returning home on the night in question and that he had, therefore, been struck on the crossing was rendered unreasonable because of the distance from it at which the body of the unfortunate man was found. The jury having drawn this inference, although the case is certainly a very close one, I am not prepared to say that their finding affirmed by the provincial Court of Appeal should now be set aside.

Upon the second question two considerations are pressed upon the defendants: first, that a person coming towards the crossing as the deceased did, could have a clear and unobstructed view of an approaching train for 25 yards before he reached the rails, and secondly, had he looked when at that distance, or at any time thereafter,

crossed the tracks, Griffith could not have failed to see the train; and therefore urged that his death should be ascribed rather to his failure to take ordinary care than to the defendants' omission of their statutory duty; in the second place, it is said that the train, when approaching the crossing, was ascending a grade, and that in doing so, the engine made so much noise that, as the plaintiff herself says, it was audible to her standing in her doorway half a mile east of the crossing; and she adds that she also saw the light from the fire-box reflected on the escaping smoke and steam. The appellants maintain that it is, therefore, a pure conjecture that Griffith would have heard the omitted signal, had it been given.

In support of his contention that the case should have been withdrawn from the jury Mr. McCarthy urged that the fact that the accident might be attributed to failure of the deceased to look or listen before crossing the railway rendered it impossible for the jury to find, except as a mere guess or surmise, that breach of duty on the part of the defendants was the cause of the accident. The conduct of the deceased is primarily of importance upon the issue of contributory negligence. With that issue the jury must deal, the burden of proof resting upon the defendants. It certainly cannot be laid down as an absolute rule that failure to look and listen before crossing a railway must in every instance and in all circumstances be held to be contributory negligence sufficient to debar relief. There may be circumstances which wholly excuse that omission. That the deceased might have been in a flurried state of mind owing to anxiety to procure a ticket for a friend was deemed a consideration which could not have been withdrawn from the jury in *Dublin, W. & W. Ry. Co. v. Slattery*, 115 App. Cas. 1155, at p. 1167. In the present instance the evidence establishes that when Griffith reached the Kenilworth Avenue crossing assuming him to have been struck on that crossing as found by the jury, there was a freight train approaching from the east. This, if it is proved, gave the statutory signals for the crossing, and it is quite possible that his attention may have been so absorbed by it that, for that reason, he failed to hear or observe the train coming in the opposite direction. It is for the jury to determine whether, in the circumstances, his failure to look to the west when about to cross the tracks amounted to contributory negligence.

When it is urged that, having regard to the presence of the freight train and to the fact that the deceased presumably failed to hear the noise made by the engine of the passenger train which struck him, it must be the veriest conjecture or surmise to say that if the freight train had given the statutory signals they would have attracted

the attention of the deceased and prevented the accident. The of presenting the defendant's case is certainly captivating. however, the fact that Parliament has deemed it wise to railway trains approaching highway crossings shall give c nals not for the purpose of attracting the attention of those already on the alert and need no warning, but for the p arousing those who are distracted or whose attention is owing to whatever cause and who, therefore, need warning ment has specified the particular signals which in its judg best fitted to serve this purpose. Where it is clearly proved signals have been omitted and that an accident which the them might have prevented, has occurred, it must, I think, within the province of a jury to say whether or not, having all these circumstances, the breach of statutory duty should to be the determining cause of the accident. The moment th is reached that the statutory signals, if given, might have the accident and there is evidence of their omission, it is n for the trial judge to withdraw the case from the jury, (deed, what is incontrovertibly contributory negligence is ac is so clearly proved in the plaintiff's own case that it would to direct a jury to find it) and if, upon the case being sul them, the jury see fit to draw the inference that the omis signals was in fact the cause of the accident, it is not com an appellate court to disturb that conclusion. Had I been t case without a jury I am by no means satisfied that I sh reached the conclusion at which the jury arrived. But, as pointed out time and again an appellate judge should not reason, interfere.

I would dismiss this appeal with costs.

BRODEUR, J. The appeal should be dismissed. I agree opinion given by the Chief Justice.

Appeal dismissed with costs.

IVES v. SOUTH BUFFALO RAILWAY CO.

[COURT OF APPEALS OF NEW YORK, MARCH 24, 1911.]

201 N. Y. 271.

1. Master and Servant—Statute—Validity—Fellow Servant—Rule of Contributory Negligence.

It is within the power of the Legislature to abolish the fellow-servant rule and the law of contributory negligence, as applied to the liability of a master for an alleged negligent injury sustained by his servant.

2. Master and Servant—Statute—Validity—Liability of Master—Workmen's Compensation Act.

An Act (Workmen's Compensation Act) which attempts to make a master liable for an injury sustained by a servant as a necessary risk incident to his employment, or one inherent in the nature thereof, without any fault on the part of the master, unless such injury is due to the wilful misconduct of other servants, is void as a taking of liberty and property without due process of law.

3. Master and Servant—Statute—Validity—Classification of Workmen.

The classification for purposes of taxation or of regulation under a police measure, of workmen engaged in the erection or demolition of bridges or buildings of iron or steel construction, or in the operation of elevators used in connection with the erection or demolition of such bridges or buildings, or in work on scaffolds of any kind elevated 20 feet or more, or about wires charged with electric currents, or with explosives, or in the operation of railroads, or in the construction of tunnels and subways, or in work carried on under compressed air, is not a denial of the equal protection of the laws, on the ground that the classification is arbitrary.

4. Master and Servant—Statutes—Injured Employees—Compensation.

It is within the power of the Legislature to provide new measures or means for the recovery of compensation by servants who sustain injuries in the performance of the duties of their employment.

Appeal by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department (140 App. Div. 921, 125 N. Y. Supp. 1125, mem.), which affirmed a judgment of the Special Term of Erie County (68 Misc. 643, 124 N. Y. Supp. 920), rendered in favor of plaintiff sustaining a demurrer to an answer in an action brought to recover compensation under Art. 14a of the Labor Law, being Chap. 674 of the Laws of 1910, for injuries sustained by him in the course of his employment. Reversed.

NOTE.

On the subject of the Constitutionality of Workmen's Compensation Acts, see note to CUNNINGHAM v. NORTHWEST-

EEN IMPROVEMENT CO., — Mont. —, 119 Pac. 554 (1911) reported in this volume of Negligence and Compensation Cases Annotated (1 N. C. C. A.), p. 720, post.

For appellant—Louis Marshall, and Charles B. Sears.

Against the Act—Julien T. Davies, intervener.

For respondent—Thomas C. Burke.

For National Civic Federation—Everett P. Wheeler, intervener.

COMPLAINT.

The plaintiff in the above-entitled action, by Crangle & Burke, attorneys, complaining of the above named defendant, alleges:

I. Upon information and belief, that the defendant, The Buffalo Railway Company, is a domestic corporation organized about the 25th day of April, 1899, under the Railroad Law of the State of New York (being Chapter 565 of the Laws of 1899, as amended), for the purpose of building, maintaining and operating a railroad.

II. That at all of the times hereinafter mentioned the defendant operated and now operates by steam a standard gauge railroad about eight miles in length, for the carriage of passengers and merchandise, and that said railroad is wholly located within the County of Erie and State of New York, and extends from a point in the southeasterly part of the City of Buffalo, near the junction of the Buffalo and Tonawanda Railroad with the Delaware, Lackawanna & Western Railroad, in a southerly direction to the southerly part of the Lackawanna Plant, in the southwesterly part of the City of Lackawanna.

III. That on the 2nd day of September, 1910, and for more than one year prior thereto, the plaintiff was a workman engaged in manual and mechanical labor in the employment of defendant as a switchman in the operation on defendant's said steam railroad of locomotives, engines, trains and cars propelled by steam, and that his average weekly earnings, when at work on full time during said year, were \$27.09.

IV. That heretofore and on the 2nd day of September, 1910, at about 11:30 o'clock in the forenoon, plaintiff was engaged in his duties as a switchman on a train of defendant propelled by steam of about thirty-five cars loaded with coke, standing on Pennsylvania Railroad track No. 2 in Pennsylvania Railroad yards at about from 150 to 200 feet south of Pennsylvania Railroad Inspector's shanty and at a connection with the tracks of defendant's railroad, and that plaintiff so engaged plaintiff stood on or about the thirty-second car of said train, and gave a signal to the engineer of the locomotive attached to said train to take up the slack in the train, and that upon the

neer so doing, the jar in taking up the slack caused plaintiff to fall to the ground and he sprained his left ankle and was otherwise bruised and injured.

V. That wholly by reason of said injury plaintiff became totally disabled from earning any wages whatever and has been so disabled for over three weeks last past, and on information and belief that plaintiff will be totally disabled for a period of at least four more weeks from earning any wages whatever at the work at which he was employed, or at any gainful employment.

VI. That plaintiff sustained said personal injury by accident arising out of and in the course of his employment as aforesaid, and that such injury was caused, in whole or in part, by a necessary risk or danger of such employment, or one inherent in the nature thereof, and that said injury to plaintiff was not caused in whole, or in part, by any serious or willful misconduct of plaintiff.

VII. That plaintiff claims from defendant compensation of ten dollars (\$10.00) for the week commencing at the end of the second week after his injury, to-wit: For the week commencing the 17th day of September, 1910, and claims compensation at the same rate during the four weeks next succeeding, which will be the period of plaintiff's incapacity, pursuant to the provisions of Article 14a of the Labor Law.

VIII. That heretofore and on the 12th day of September, 1910, and prior to the commencement of this action, and as soon as practicable after the happening of said accident, and before plaintiff had voluntarily left the employment in which he was injured, and during plaintiff's disability, notice of the accident was given to defendant as provided in § 219 of the Labor Law, and that said notice stated the name and address of plaintiff, the date and place of the accident, and in simple language the physical cause thereof; that said notice was served by sending it by mail in a registered letter addressed to the defendant at the City of Lackawanna, New York, that being defendant's last known place of business.

IX. That prior to the commencement of this action plaintiff demanded of defendant the sum of ten dollars (\$10.00) for compensation for the week commencing the 17th day of September, 1910, but that said defendant refused to pay same and has failed to make any compensation whatever to plaintiff, and has refused to determine the question of plaintiff's compensation or right thereto, either by agreement or by arbitration, as provided in the Code of Civil Procedure, and has informed plaintiff that it will make no compensation what-

ever to plaintiff, and that this action is commenced within six months after the happening of said accident.

Wherefore, plaintiff demands judgment against defendant for the sum equal to the amount of payment now due, to-wit: the sum of \$10.00, and to prospectively become due to plaintiff under Article 1 of the Labor Law, to-wit: The sum of \$40.00, amounting in the aggregate to the sum of \$50.00, together with the costs of this action.

ANSWER.

The defendant, by Rogers, Locke & Babcock, its attorneys, answers and denies the complaint of the plaintiff herein:

1. Admits each and every allegation in the complaint contained therein, including the allegation that plaintiff's weekly earnings for the period preceding the accident alleged in the complaint, were \$27.09, and the allegation that plaintiff has been totally disabled for a period of three weeks and will be totally disabled for the further period of three weeks from earning any wages whatever at the work at which he was working or at any gainful employment.

2. And for a defense to the alleged cause of action set forth in the complaint, it alleges upon information and belief that Article XIV-a of the Labor Law, being Chapter 674 of the Laws of 1911 of the State of New York, is unconstitutional and void, in that it violates and contravenes various provisions of the Constitution of the State of New York and of the United States, among others the following:

(a.) Section 6, Article 1, of the Constitution of the State of New York, by depriving this defendant and many other persons of life and property without due process of law.

(b.) Section 1, Article 1, of the Constitution of the State of New York, by securing to certain citizens of the State rights and privileges which are denied to other members of the State.

(c.) Section 2, Article 1, of the Constitution of the State of New York, by depriving this defendant, and many other persons of life and property without due process of law and of the equal protection of the laws.

(d.) Section 18, Article 1, of the Constitution of the State of New York, by imposing a statutory limitation upon the amount recoverable for injuries resulting in death.

(e.) The Fourteenth amendment of the Constitution of the United States, by depriving this defendant, and other persons of life and property without due process of law and of the equal protection of the laws.

Wherefore, this defendant demands judgment dismissing the plaintiff's complaint, with costs.

STATEMENT OF FACTS: This is an action brought by an employee against his employer to recover compensation under article 14a of the Labor Law, being chapter 674 of the Laws of 1910, entitled "An Act to amend the Labor Law, in relation to workmen's compensation in certain dangerous employments." The complaint alleges, in substance, that on the 2nd day of April, 1910, while the plaintiff was engaged in his work as a switchman on defendant's steam railroad, he was injured solely by reason of a necessary risk or danger of his employment, that at the time of the commencement of the action he had been totally incapacitated for labor for a period of three weeks, and that such incapacity would continue for four weeks longer, and demands judgment for compensation in accordance with the provisions of said Act for a period of five weeks. The answer, after admitting all the allegations of the complaint, pleaded as a defense the unconstitutionality of article 14a of the Labor Law, upon the ground that it contravenes certain provisions of the Federal and State Constitutions. The plaintiff demurred to this defense on the ground that it was insufficient in law upon the face thereof. The issue of law thus presented was tried at Special Term, where the demurrer was sustained. Final judgment was entered upon this decision, and the defendant appealed to the Appellate Division, where the judgment was affirmed by a divided court.

This statute, which has been added to the Labor Law, is known as article 14a thereof, and consists of 12 sections, which we quote in full, and the question presented upon this appeal is whether it is repugnant to any of the provisions of the Federal and State Constitutions invoked by the defendant.

"Workmen's Compensation in Certain Dangerous Employments.

"§ 215. Application of Article.—This article shall apply only to workmen engaged in manual or mechanical labor in the following employments, each of which is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risks to the life and limb of workmen engaged therein are inherent, necessary or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen.

"1. The erection or demolition of any bridge or building in which there is, or in which the plans and specifications require, iron or steel frame work.

"2. The operation of elevators, elevating machines or derrick hoisting apparatus used within or on the outside of any building for the conveying of materials in connection with the construction or demolition of such bridge or building.

"3. Work on scaffolds of any kind elevated twenty feet or more above the ground, water, or floor beneath in the erection, construction, painting, alteration or repair of buildings, bridges or structures.

"4. Construction, operation, alteration or repair of wires, cables, switchboards or apparatus charged with electric currents.

"5. All work necessitating dangerous proximity to guns, explosives, blasting powder, dynamite or any other explosives, where the same are used as instrumentalities of the industry.

"6. The operation on steam railroads of locomotives, engines, trains, motors or cars propelled by gravity or steam, electricity or other mechanical power, or the construction or repair of steam tracks and road beds over which such locomotives, engines, motors or cars are operated.

"7. The construction of tunnels and subways.

"8. All work carried on under compressed air.

"§ 216. Definitions.—The words, 'employer,' 'workman' and 'employment,' or their plurals, used in this article, shall be construed to apply to all the employments above described.

"§ 217. Basis of Liability.—If, in the course of any of the employments above described, personal injury by accident arising out of and in the course of the employment after this article takes effect is sustained by any workman employed therein, in whole or in part, or the injury or injury caused thereby is in whole or part contributed to by the negligence of the employer, the employer shall be liable to pay compensation as follows:

"a. A necessary risk or danger of the employment or one of the conditions in the nature thereof; or

"b. Failure of the employer of such workmen or any of his officers, agents or employees to exercise due care, or to comply with any law affecting such employment; then such employer shall, as hereinafter mentioned, be liable to pay compensation at the rate set out in section two hundred and nineteen-a of this title; provided that the employer shall not be liable in respect of any injury which does not disable the workman for a period of at least two weeks, or which does not prevent him from earning full wages at the work at which he was employed, and provided that the employer shall not be liable in respect of any injury to the workman which is caused in whole or in part by the serious and willful misconduct of the workman.

"§ 218. Rights of Action Not Affected.—The right of action for damages caused by any such injury, at common law or under

statute in force on January one, nineteen hundred and ten, shall not be affected by this article, and every existing right of action for negligence or to recover damages for injuries resulting in death is continued, and nothing in this article shall be construed as limiting such right of action, but in case the injured workman, or in event of his death his executor or administrator, shall avail himself of this article, either by accepting any compensation hereunder in accordance with section two hundred and nineteen-a hereof, or by beginning proceedings therefor in any manner on account of any such injury, he shall be barred from recovery in and deemed thereby to have released every other action at common law or under any other statute on account of the same injury after this article takes effect. In case after such injury the workman, or in the event of his death his executor or administrator, shall commence any action at common law or under any statute other than this article against the employer therefor he shall be barred from all benefit of this article in regard thereto.

“§ 219. Notice of Accident.—No proceedings for compensation under this article shall be maintained unless notice of the accident as hereinafter provided has been given to the employer as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and during such disability, but no want or defect or inaccuracy of a notice shall be a bar to the maintenance of proceedings unless the employer proves that he is prejudiced by such want, defect or inaccuracy. Notice of the accident shall state the name and address of the workman injured, the date and place of the accident, and in simple language the physical cause thereof, if known. The notice may be served personally or by sending it by mail in a registered letter addressed to the employer at his last known residence or place of business.

“§ 219a. Scale of Compensation.—The amount of compensation shall be in case death results from injury:

“a. If the workman leaves a widow or next of kin at the time of his death wholly dependent on his earnings, a sum equal to twelve hundred times the daily earnings of such workman at the rate at which he was being paid by such employer at the time of the injury subject as hereinafter provided, and in no event more than three thousand dollars. Any weekly payments made under this article shall be deducted in ascertaining such amount.

“b. If such widow or next of kin at the time of his death are in part only dependent upon his earnings, such proportionate sum not exceeding that provided in subdivision a as may be determined according to the injury to such dependents.

"c. If he leaves no dependents, the reasonable expenses of medical attendance and burial, not exceeding one hundred dollars.

"Whatever sum may be determined to be payable under this article in case of death of the injured workman shall be paid to his legal representative for the benefit of such dependents, or if he leaves no dependents, for the benefit of the persons to whom the expenses of medical attendance and burial are due.

"2. Where total or partial incapacity for work at any gainful employment results to the workman from the injury, a weekly payment commencing at the end of the second week after the injury and continuing during such incapacity, subject as herein provided, shall be fifty per centum of his average weekly earnings when at work at full time during the preceding year during which he shall have been in the employment of the same employer, or if he shall have been in the employment of the same employer for less than a year, then a payment of not exceeding three times the average daily earnings at full time for such less period. In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average earnings of the workman before the accident and the average amount he is able to earn thereafter as wages in the same employment or otherwise. In fixing the amount of the weekly payment, regard shall be had to any payment, allowance or benefit which the workman may have received from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of his average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in the same employment or otherwise after the accident, but shall not exceed one-half of such difference. *In no event shall any compensation payable under this article exceed the damage suffered, nor shall any weekly payment payable under this article in any event exceed ten dollars and shall not extend over more than eight years from the date of the accident.*

"§ 219b. Medical Examinations.—Any workman entitled to weekly payments under this article is required, if requested by the employer, to submit himself for examination by a duly qualified physician or practitioner or surgeon provided and paid for by the employer at a reasonable time and place reasonably convenient for the workman, within four weeks after the injury, and thereafter at intervals not often than once in six weeks. If the workman refuses to submit to such examination, or obstructs the same, his right to weekly payments shall be suspended until such examination has taken place, and no compensation shall be payable during or for account of such period.

“§ 219c. Incompetency of Workman.—In case an injured workman shall be mentally incompetent at the time when any right or privilege accrues to him under this article, a committee or guardian of the incompetent appointed pursuant to law may, on behalf of such incompetent, claim and exercise any such right or privilege with the same force and effect as if the workman himself had been competent and had claimed or exercised any such right or privilege; and no limitation of time in this article provided for shall run so long as said incompetent workman has no committee or guardian.

“§ 219d. Settlement of Disputes.—Any question which may arise under this Act shall be determined either by agreement or by arbitration as provided in the Code of Civil Procedure or by an action at law as herein provided. In case the employer fails to make compensation as herein provided, the injured workman, or his committee or guardian, if such be appointed, or his executor or administrator, may then bring an action to recover compensation under this article in any court having jurisdiction thereof, or in any court which would have had jurisdiction of an action for recovery of damages for negligence for the same injury between the same parties. This article however shall not be construed as extending the jurisdiction of any such court to award judgment for an amount greater than now allowed by law. Such action shall be conducted in the same manner as actions at law for the recovery of damages for negligence. The judgment in such action if in favor of the plaintiff shall be for a sum equal to the amount of payments then due and prospectively due under this article. Such action must be commenced within six months after the happening of the accident or in case of the death of the workman by such accident within six months after the appointment of his legal representative in this State, or in the event of his physical incapacity, within six months after the removal thereof, or in the event of weekly payments by the employer hereunder, within six months after such payments have ceased. In such action by an executor or administrator the judgment may provide the proportions of the award or the costs to be distributed to or between the several dependents. If such determination is not made it shall be determined by the Surrogate's Court, in which such executor or administrator is appointed, in accordance with this article, on petition of any party interested on such notice as such court may direct.

“§ 219e. Preferences and Exemptions.—Any person entitled to weekly payments under this article against any employer shall have the same preferential claim therefor against the assets of the employer as allowed by law for a claim by such person against such employer for

unpaid wages or personal services. Weekly payments due under this article shall not be assignable or subject to levy, execution or attachment.

"§ 219f. Attorneys' Liens.—No claim of an attorney at law for a contingent interest in any recovery under this article for securing such recovery or for disbursements shall be an enforceable lien on such recovery, unless the amount of the same be approved in writing by a justice of the Supreme Court, or in case the same be tried at a trial court, by the justice presiding at such trial.

"§ 219g. Liability of Principal Contractors.—If an employer shall be the principal enters into a contract with an independent contractor to do part of such employer's work, or if such contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contractor's contract with the employer, the principal shall be liable to pay to any workman employed in the performance of the work any compensation under this article which the contractor would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or provided for by a contract are taken against the principal then, in the application of the provisions of this article references to the principal shall be substituted for references to the contractor or employer, except that the amount of compensation shall be calculated on the basis of reference to the earnings of the workman under the contract with the employer by whom he is immediately employed. Where such principal is not liable to pay compensation he shall be entitled to be indemnified by the contractor or person who would have been liable to pay compensation to the workman independently of this section. Nothing in this section shall be construed as preventing a workman from recovering compensation under this article from the contractor or sub-contractor, instead of from the principal; nor shall this section apply in any case where the accident shall occur elsewhere than on, or in, or about the premises of the principal, or where the principal has undertaken to execute the work or which he has not otherwise under his control or management."

WERNER, J. In 1909 the Legislature passed a law (chapter 1000) providing for a commission of 14 persons, 6 of whom were to be appointed by the Governor, 3 by the President of the Senate, and 5 by the Speaker of the Assembly from the Assembly. The commission was to make inquiry, examination and investigation into the working of the law in the State of New York relative to the liability of employers and employees for industrial accidents, and into the comparative cost, justice, merits and defects of the laws of other industrial states and countries, relative to the same subject, and as to the cau-

accidents to employees." The Act contained other provisions germane to the subject and provided for a full and final report to the Legislature of 1910, if practicable, and if not practicable, then to the Legislature of 1911, with such recommendations for legislation by bill or otherwise as the commission might deem wise or expedient. Such a commission was appointed and promptly organized by the election of officers and the appointment of subcommittees; the chairman being Senator Wainwright, from whom it has taken the name of the "Wainwright Commission," by which it is popularly known. No word of praise could overstate the industry and intelligence of this commission in dealing with a subject of such manifold ramifications and of such far-reaching importance to the State, to employers, and to employees. We cannot dwell in detail upon the many excellent features of its comprehensive report, because the limitations of time and space must necessarily confine us to such of its aspects as have a necessary relation to the legal questions which we are called upon to decide. As the result of its labors the commission recommended for adoption the bill which, with slight changes, was enacted into law by the Legislature of 1910, under the designation of article 14a of the Labor Law. This Act is modeled upon the English Workmen's Compensation Act of 1897, which has since been extended so as to cover every kind of occupational injury. Our commission has frankly stated in its report that the classification of the industries which will be immediately affected by the present statute is only tentative, and that other more extended classifications will probably be recommended to the Legislature for its action.

The statute, judged by our common-law standards, is plainly revolutionary. Its central and controlling feature is that every employer who is engaged in any of the classified industries shall be liable for any injury to a workman arising out of and in the course of the employment by "a necessary risk or danger of the employment or one inherent in the nature thereof; * * * provided that the employer shall not be liable in respect of any injury to the workman which is caused in whole or in part by the serious and willful misconduct of the workman." This rule of liability, stated in another form, is that the employer is responsible to the employee for every accident in the course of the employment, whether the employer is at fault or not, and whether the employee is at fault or not, except when the fault of the employee is so grave as to constitute serious and willful misconduct on his part. The radical character of this legislation is at once revealed by contrasting it with the rule of the common law, under which the employer is liable for injuries to his employee only when the em-

employer is guilty of some act or acts of negligence which occurrence out of which the injuries arise, and then only if the employee is shown to be free from any negligence which contributed to the occurrence. The several judicial and statutory modifications of this broad rule of the common law we shall further on have occasion to mention. Just now our purpose is to present in short position the fundamentals of these two opposing rules, namely, that under the common law an employer is liable to his injured employee only when the employer is at fault and the employee is not at fault; while under the new statute the employer is liable to his employee not at fault, even when the employee is at fault, unless this liability amounts to serious and willful misconduct. The reasons for the departure from our long-established law and usage are summarized in the language of the commission as follows:

"First, that the present system in New York rests on a basis which is economically unwise and unfair, and that in operation it is uncertain, and productive of antagonism between workmen and employers.

"Second, that it is satisfactory to none, and tolerable only to employers and workmen who practically disregard their legal rights and obligations, and fairly share the burden of accidents in the ordinary course of business.

"Third, that the evils of the system are most marked in the case of employments, where the trade risk is high and serious accidents frequent.

"Fourth, that, as a matter of fact, workmen in the dangerous trades do not, and practically cannot, provide for themselves adequate accident insurance, and therefore the burden of serious accidents falls on the workmen least able to bear it, and brings many of them and their families to want."

This indictment of the old system is followed by a statement of the anticipated benefits under the new statute as follows: "The evils which can, we think, be best avoided by compelling the employer to bear the accident burden in intrinsically dangerous trades, since the price of his product the shock of the accident may be borne by the community. In those employments which have not so great an element of danger, in which, speaking generally, there is no such imperative demand for the exercise of the police power of the State in the safeguarding of its workers from destitution and its consequences, we recommend, as the first step in this change of system, such a modification of the present law as will do away with some of its defects in theory and practice, and increase the workman's chance of recovery under the law. With such changes in the law we

effective plan of compensation which, if generally adopted, will do away with many of the evils of the present system. Its adoption will, we believe, be profitable to both employer and employee, and prove to be the simplest way for the State to change its system of liability without disturbance of industrial conditions. Not the least of the motives moving us is the hope that by these means a source of antagonism between employer and employed, pregnant with danger for the State, may be eliminated."

This quoted summary of the report of the commission to the Legislature, which clearly and fairly epitomizes what is more fully set forth in the body of the report, is based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of which are designed to show that our own system of dealing with industrial accidents is economically, morally, and legally unsound. Under our form of government, however, courts must regard all economic, philosophical, and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be molded into statutes without infringing upon the letter or spirit of our written constitutions. In that respect we are unlike any of the countries whose industrial laws are referred to as models for our guidance. Practically all of these countries are so-called constitutional monarchies in which, as in England, there is no written constitution, and the Parliament or lawmaking body is supreme. In our country the Federal and State Constitutions are the charters which demark the extent and the limitations of legislative power; and while it is true that the rigidity of a written Constitution may at times prove to be a hindrance to the march of progress, yet more often its stability protects the people against the frequent and violent fluctuations of that which, for want of a better name, we call "public opinion."

With these considerations in mind we turn to the purely legal phases of the controversy for the purpose of disposing of some things which are incidental to the main question. The new statute, as we have observed, is totally at variance with the common-law theory of the employer's liability. Fault on his part is no longer an element of the employee's right of action. This change necessarily and logically carries with it the abrogation of the "fellow servant" doctrine, the "contributory negligence" rule, and the law relating to the employee's assumption of risks. There can be no doubt that the first two of these are subjects clearly and fully within the scope of legislative power, and that, as to the third, this power is limited to some extent by constitutional provisions.

The "fellow servant" rule is one of judicial origin, ingrafted upon the common law for the protection of the master against the consequences of negligence in which he has no part. In its early application to simple industrial conditions, it had the support of both equity and justice. By degrees it was extended until it became evident that under the enormous expansion and infinite complexity of our modern industrial conditions, the rule gave opportunity, in many instances, for harsh and technical defenses. In recent years it has been restricted in its application to large corporate and industrial enterprises, and still more recently it has been modified, and to a great extent abolished, by the Labor Law and the Employer's Liability Act.

The law of contributory negligence has the support of many systems of jurisprudence in which the fault of one is the liability for injury to another. Under such a system it is logical to hold that one who is himself to blame for his injuries cannot be permitted to entail the consequences upon another who has not been negligent at all, or whose negligence would not have caused the injury if the one injured had been free from fault. It is admitted that the reason of the rule is often lost sight of in its application to apply it to a great variety of practical conditions, and its efficacy as a rule of justice is much impaired by the lack of uniformity in its administration. In the admiralty branch of the Federal courts, for instance, we have what is known as the rule of comparative negligence, under which, when there is negligence on both sides, the fault is apportioned, and a verdict rendered accordingly. In many of the States contributory negligence is a defense which must be pleaded and proved by the defendant, and in some States it has been entirely abolished by statute. In our own State the plaintiff's freedom from contributory negligence is an essential part of his cause of action, and must be affirmatively established by him, except in cases brought by employees under the Labor Law, by virtue of which the contributory negligence of an employee is now made a defense which may be pleaded and proved by the employer; and under the Employers' Liability Act, which provides that the employee's continuance in employment after he has knowledge of dangerous conditions from which injury may ensue, shall not, as matter of law, constitute contributory negligence.

Under the common law the employee was also held to have assumed the ordinary and obvious risks incident to the employment, as the special risks arising out of dangerous conditions which were known and appreciated by him. This doctrine, too, has been modified by statute, so that under the Labor Law and the Employer's Liability Act

Act the employee is presumed to have assented to the necessary risks of the occupation or employment and no others; and these necessary risks are defined as those only which are inherent in the nature of the business and exist after the employer has exercised due care in providing for the safety of his employees, and has complied with the laws affecting or regulating the business or occupation for the greater safety of employees.

We have said enough to show that the statutory modifications of the "fellow servant" rule and the law of "contributory negligence" are clearly within the legislative power. These doctrines, for they are nothing more, may be regulated or even abolished. This is true to a limited extent as to the assumption of risk by the employee. In the Labor Law and the Employer's Liability Act, which define the risks assumed by the employee, there are many provisions which cast upon the employer a great variety of duties and burdens unknown to the common law. These can doubtless be still further multiplied and extended to the point where they deprive the employer of rights guaranteed to him by our Constitutions, and there, of course, they must stop, as we shall endeavor to demonstrate later on.

Passing now to the constitutional objections which are presented against the new statute, we will first eliminate those which we regard as clearly or probably untenable. The appellant argues and the respondent admits that the new statute cannot be upheld under the reserved power of the Legislature to alter and amend charters. It is true that the defendant in the case at bar is a railroad corporation; but the Act applies to eight enumerated occupations or industries, without regard to the character of the employers. They may be corporations, firms, or individuals. Nowhere in the Act is there any reference to corporations. The liability sought to be imposed is based upon the nature of the employment, and not upon the legal status of the employer. It is, therefore, unnecessary to decide how far corporate liability may be extended under the reserved power to alter or amend charters, except as that question may be incidentally discussed in considering the police power of the State.

The appellant contends that the classification in this statute of a limited number of employments as dangerous is fanciful or arbitrary, and is, therefore, repugnant to that part of the fourteenth amendment to the Federal Constitution which guarantees to all our citizens the equal protection of the laws. Classification, for purposes of taxation, or of regulation under the police power, is a legislative function, with which the courts have no right to interfere, unless it is so clearly arbitrary or unreasonable as to invade some constitutional right. A State

may classify persons and objects for the purpose of legislation provided the classification is based on proper and justifiable distinctions (St. John v. New York, 201 U. S. 633, 26 Sup. Ct. 554, 50 L. Ed. 107; Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 117, 32 L. Ed. 109; Minneapolis & St. L. Ry. Co. v. Herrick, 127 U. S. 209, 8 Sup. Ct. 1176, 32 L. Ed. 109; Chicago, K. & W. R. R. Co. v. Chicago, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675) and for a purpose within the legislative power. There can be no doubt, we think, that the occupations enumerated in the statute are more or less intrinsically dangerous to a degree which justifies such legislative regulation properly within the scope of the police power. We need not cite illustration or authority outside of the labor law, to which the statute has been added. The whole of that law which precedes the latest addition is devoted to restrictions and regulations imposed upon employers in specified occupations or conditions for the conservation of the health, safety, and morals of employees. These restrictive regulations do not affect all employers alike in all occupations, are they designed to have that effect. The mandate of the Constitution is complied with if all who are in a particular occupation are treated alike (Missouri Pac. Ry. Co. v. Humes, 115 U. S. 512, 5 Sup. Ct. 110, 29 L. Ed. 463; Barbier v. Connolly, 113 U. S. 273, 5 Sup. Ct. 357, 28 L. Ed. 923; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; Magoun v. Ill. Trust & Sav. Bank, 113 U. S. 283, 294, 18 Sup. Ct. 594, 42 L. Ed. 1037; People ex rel. 1 v. Reardon, 184 N. Y. 431, 77 N. E. 970, 8 L. R. A. (N. S.) 314, 10 St. Rep. 628; People ex rel. Farrington v. Mensching, 187 N. Y. 79, 79 N. E. 884, 10 L. R. A. [N. S.] 625), and that, we think, is the basis of this classification.

Another objection urged against the statute is that it violates article 1 of our State Constitution, which provides that "the right of trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." This objection is aimed at the provisions of sections 219a and 219d of the statute, which relate to the "scale of compensation" and "settlement of disputes," and has no reference to the fundamental question whether the attempt to impose upon the employer a liability, when he is not at fault, constitutes a taking of property without due process of law. In other words, the objection now being considered bears solely upon the question whether the last-mentioned sections of the statute deprive the employee of his right to have a jury fix the amount which he shall pay when his liability to pay has been determined against him. If these provisions relating to compensation are to be construed as definitely fixing

amount which an employer must pay in every case where his liability is established by the statute, there can be no doubt that they constitute a legislative usurpation of one of the functions of a common-law court. In all cases where there is a right to trial by jury there are two elements which necessarily enter into a verdict for the plaintiff: (1) The right to recover. (2) The amount of the recovery. It is as much the right of a defendant to have a jury assess the damages claimed against him as it is to have the question of his liability determined by the same body. *East Kingston v. Towle*, 48 N. H. 57, 97 Am. Dec. 2, 2 Am. Rep. 174; *Wadsworth v. Union Pacific Ry. Co.*, 18 Colo. 33, 33 Pac. 515, 23 L. R. A. 812, 36 Am. St. Rep. 309; *Fairchild v. ...*, 68 Vt. 202, 34 Atl. 692. This part of the statute, in its present form, has given rise to conflicting views among the members of the court, and, since the disposition of the questions which it suggests is necessary to the decision of the case, we do not decide it.

Thus far we have considered only such portions of the statute as we deem to be clearly within the legislative power, and one as to which there is difference of opinion. This we have done because we desire to present no purely technical or hypercritical obstacles to any effort for the beneficent reformation of a branch of our jurisprudence. In which, it may be conceded, reform is a consummation devoutly to be wished. In this spirit we have called attention to those features of the new statute which might be upheld as consonant with legislative authority under our constitutional limitations, as well as to the questions upon which we are in doubt. We turn now to the two objections which we regard as fatal to its validity.

This legislation is challenged as void under the fourteenth amendment to the Federal Constitution and under § 6, art. 1 of our State Constitution, which guarantee all persons against deprivation of life, liberty, or property without due process of law. We shall not stop to dwell at length upon definitions of "life," "liberty," "property," and "due process of law." They are simple and comprehensive in themselves, and have been so often judicially defined that there can be no misunderstanding as to their meaning. "Process of law" in its broad sense means law in its regular course of administration through courts of justice, and that is but another way of saying that every man's right to life, liberty, and property is to be disposed of in accordance with those ancient and fundamental principles which have been in existence when our Constitutions were adopted. "Due process of law" implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense,

to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears upon the question of right in the matter involved. If any question of liability be conclusively presumed against him this is not due process of law." *Ziegler v. S. & N. Ala. R. R. Co.*, 58 Ala. 594. Liberty is authoritatively defined as "the right of one to use his faculties in any lawful ways, to live and work where he will, to earn his living in any lawful calling, and to pursue any lawful trade or occupation" (*Matter of Jacobs*, 98 N. Y. 98, 106, 50 Am. Rep. 636); and the right of property as "the right to acquire, possess and enjoy it in a manner consistent with the equal rights of others and the just exactions and demands of the State" (*Bertholf v. O'Reilly*, 74 N. Y. 500, 50 Am. Rep. 323). The several industries and occupations mentioned in the statute before us are concededly lawful within any and all numerous definitions which might be referred to, and have always been so. They are, therefore, under the constitutional protection of the inalienable rights of every citizen is to hold and enjoy his property until it is taken from him by due process of law. When the new constitutions were adopted, it was the law of the land that no person was without fault or negligence could be held liable in damages for injuries sustained by another. That is still the law, except in the cases of employers enumerated in the new statute, and as to them it is provided that they shall be liable to their employees for personal injury incident to any workman arising out of and in the course of his employment which is caused in whole or in part, or is contributed to by a necessary risk or danger of the employment or one inherent in the nature thereof, except that there shall be no liability in such cases where the injury is caused in whole or in part by the willful misconduct of the injured workman.

It is conceded that this is a liability unknown to the common law, and we think it plainly constitutes a deprivation of liberty of property under the Federal and State Constitutions, unless it can be justified under the police power which will be discussed under a separate head. In arriving at this conclusion we do not ignore the cogent economic and sociological arguments which are in support of the statute. There can be no doubt as to the wisdom of the law. It is based upon the proposition that the inherent risk of employment should in justice be placed upon the shoulders of the employer, who can protect himself against loss by insurance as well as an addition to the price of his wares as to cast the burden of the cost upon the consumer; that indemnity to an injured employee should be as much a charge upon the business as the cost of replacement.

airing disabled or defective machinery, appliances, or tools; that, under our present system, the loss falls immediately upon the employee who is almost invariably unable to bear it, and ultimately upon the community which is taxed for the support of the indigent; and that our present system is uncertain, unscientific, and wasteful, and fosters a spirit of antagonism between employer and employee which it is to the interests of the State to remove. We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment; but we think it is an appeal which must be made to the people, and not to the courts. The right of property rests, not upon philosophical or scientific speculations, nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That can be changed by the people, but not by Legislatures. In a government like ours, theories of public good or necessity are often so plausible or sound as to command popular approval; but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided.

Law, as used in this sense, means the basic law, and not the very act of legislation which deprives the citizen of his rights, privileges, or property. Any other view would lead to the absurdity that the Constitutions protect only those rights which the Legislatures do not take away. If such economic and sociologic arguments as are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of Legislatures, and the guarantees of the Constitution are a mere waste of words. *Wynehamer v. People*, 13 N. Y. 378; *Taylor v. Porter*, 4 Hill, 40, 145, 40 Am. Dec. 274; *Norman v. Heist*, 5 Watts & S. (Pa.) 171, 40 Am. Dec. 493; *Hoke v. Henderson*, 15 N. C. 15, 25 Am. Dec. 677. As stated by Judge Comstock in the case of *Wynehamer v. People*, "these constitutional safeguards, in all cases, require a judicial investigation, not to be governed by a law specially enacted to take away and destroy existing rights, but confined to the question whether, under the pre-existing rule of conduct, the right in controversy has been lawfully acquired and is lawfully possessed." Page 395 of 13 N. Y. If the argument in support of this statute is sound, we do not see why it cannot logically be carried much further. Poverty and misfortune from every cause are detrimental to the State. It would probably conduce to the welfare of all concerned if there could be a more equal distribution of wealth. Many persons have much more property than they can use to advantage and many more find it im-

possible to get the means for a comfortable existence. If the law can say to an employer, "You must compensate your employee for an injury not caused by you or by your fault," why can it not say further and say to the man of wealth, "You have more property than you need, and your neighbor is so poor that he can barely live; in the interest of natural justice you must divide with your neighbor so that he and his dependents shall not become a charge upon the State?"

The argument that the risk to an employee should be borne by the employer, because it is inherent in the employment, may be economically sound; but it is at war with the legal principle that no person can be compelled to assume a risk which is inseparable from the employment of the employee, and which may exist in spite of a degree of care on the part of the employer far greater than may be exacted by the moral law. If it is competent to impose upon an employer, who has no legal duty and has committed no wrong, a liability based upon a legislative fiat that his business is inherently dangerous, it is equally competent to visit upon him a special tax for the support of hospitals and other charitable institutions, upon the theory that the funds are devoted largely to the alleviation of ills primarily due to the business. In its final and simple analysis that is taking the property from A. and giving it to B., and that cannot be done under our Constitutional law. Practical and simple illustrations of the extent to which the degree of liability might be carried could be multiplied *ad infinitum*; many will readily occur to the thoughtful reader.

There is, of course, in this country no direct legal authority upon the subject of the liability sought to be imposed by this statute; but the theory is not merely new in our system of jurisprudence, but is wholly antagonistic to its basic idea. The English authorities are of little assistance to us, because in the King's Courts the decrees of the House of Lords and the Parliament are the supreme law of the land, although they are interesting in their disclosures of the paternalism which logically flows from a universal employer's liability based solely upon the relationship of employer and employee, and not upon fault in the employment. There are a few American cases, however, which clearly state the legal principle which, we think, is applicable to the case at bar, and with reference to them we shall close this branch of the discussion. In the *Nitroglycerine Case* (*Parrot v. Wells, Fargo & Co.*, 15 Wall. L. Ed. 206) the plaintiff, who was the common landlord of the defendants and other tenants, sought to hold the defendants liable for damages occasioned to the premises occupied by the other tenants by an explosion of nitroglycerine which had been delivered to them.

as common carriers for shipment. It appeared that the defendants were innocently ignorant of the contents of the packages containing the dangerous explosives, and that they were guilty of no negligence in receiving or handling them. Upon these facts the Federal Supreme Court held that it was a case of unavoidable accident for which no one was legally responsible. In *Ohio & Miss. Ry. Co. v. Key*, 78 Ill. 55, 20 Am. Rep. 259, the question was whether the railroad company was liable under a statute which provided that "every railroad company running cars within this State shall be held liable for all the expense of the coroner and his inquest, and the burial of persons who may die on the cars, or who may be killed by collision or other accident occurring to such cars, or otherwise." In speaking of the effect of that section of the law Mr. Justice Breese observed: "An examination of the section will show that no default, or negligence of any kind, need be established against the railroad company; that they are mulcted in heavy charges if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by railroad corporations is lawful and of great public benefit. It is not aimed that the liability attaches for the violation of any law, the commission of any duty, or the want of proper care or skill in running their trains. The penalty is not aimed at anything of this kind. We impose a penalty, for it is in the nature of a penalty, and there is a constitutional inhibition against imposing penalties where no law has been violated or duty neglected. Neither is pretended in this case, nor are they in contemplation of the statute. A passenger on a train dies from sickness. He is a man of wealth. Why should his burial expenses be charged to the railroad company? There is neither reason nor justice in it; and if he be poor, having not the means for a decent burial, the general law makes ample provision for such cases." The same effect are the numerous cases arising under statutes passed by different States imposing upon railroad corporations absolute liability for killing or injuring upon their rights of way horses, cattle, etc., by running over them, in which this liability was held to constitute a deprivation of property without due process of law. *Jencks v. Union Pac. Ry. Co.*, 6 Utah, 253, 21 Pac. 994, 4 L. R. A. 724; *Engler v. S. & N. Ala. Ry. Co.*, 58 Ala. 594; *Birmingham Ry. Co. v. Persons*, 100 Ala. 662, 13 South. 602, 27 L. R. A. 263, 46 Am. St. Rep. 1; *Bielingbery v. Montana Union Ry. Co.*, 8 Mont. 271, 20 Pac. 314, 1 L. R. A. 813; *Schenk v. Union Pac. Ry. Co.*, 5 Wyo. 430, 12 Am. Neg. Rep. 659n, 40 Pac. 840; *Catril v. Union Pac. Ry. Co.*, 2 Idaho, 576, 21 Pac. 416.

A different interpretation has been given to statutes imposing on railroad corporations the duty to fence their rights of way, in which the liability is imposed for failure to obey the common-law statutes. *Quackenbush v. Wis. Ry. Co.*, 62 Wis. 411, 22 N. W. 2d 100; *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 463; *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U. S. 207, 32 L. Ed. 585. "But even such statutes," says Mr. Justice Brandeis in his work on Constitutional Law (2d Ed. p. 351), "cannot justify the imposition of such a penalty in cases where the fault lies at the door of the company. If the law attempts to make such a company liable for accidents which were not caused by their negligence or disobedience of the law, but by the negligence of others or by uncontrollable causes, or does not give the company an opportunity to show these facts in its own defense, it is void."

We conclude, therefore, that in its basic and vital features the remedy given to the employee by this statute does not preserve to the employer the "due process" of law guaranteed by the Constitution. It authorizes the taking of the employer's property without compensation and without his fault. So far as the statute merely adds a new remedy, in addition to those which existed before, it is valid. The State has complete control over the remedies which it offers to suitors in its courts, even to the point of making the law applicable to rights or equities already in existence. It may modify the common law and the statutes, so as to create duties and liabilities which never existed before. It is true, as stated by Mr. Justice Brandeis in *Holden v. Hardy*, 169 U. S. 366, 385, 386, 18 Sup. Ct. 383, 42 L. Ed. 780, that "the law is, to a certain extent, a product of human science; that in some of the States methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which have formerly been laid upon the conduct of individuals, or of corporations or individuals, had proved detrimental to their interests; while, on the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection. Even before the adoption of the Constitution, much had been done toward mitigating the harshness of the common law, particularly in the administration of its criminal branch. . . . The present century has originated legal reforms of no less importance. The whole fabric of special pleading has been thought to be necessary to the elimination of the real issues between the parties, has crumbled to pieces. The ancient tenures of

ve been largely swept away, and land is now transferred almost as
 ily and cheaply as personal property. Married women have been
 anticipated from the control of their husbands and placed upon a
 practical equality with them with respect to the acquisition, posses-
 sion, and transmission of property. Imprisonment for debt has been
 abolished. Exemptions from execution have been largely added to,
 and in most of the States homesteads are rendered incapable of seizure
 and sale upon forced process. Witnesses are no longer incompetent by
 reason of interest, even though they be parties to the litigation. In-
 dictments have been simplified, and an indictment for the most se-
 rious of crimes is now the simplest of all. In several of the States
 and juries, formerly the only safeguard against a malicious prosecu-
 tion, have been largely abolished, and in others the rule of unanimity,
 so far as applied to civil cases, has given way to verdicts rendered by
 a three-fourths majority." The power of the State to make such
 changes in methods of procedure and in substantive law is clearly
 recognized. *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111, 292,
 1 L. Ed. 232; *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L.
 Ed. 578; *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct.
 1, 32 L. Ed. 107; *Hallinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. 105,
 1 L. Ed. 986; *Matter of Kemmler*, 136 U. S. 436, 10 Sup. Ct. 930, 34
 L. Ed. 519; *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. 570, 38 L.
 Ed. 485. We repeat, however, that this power must be exercised with-
 out the constitutional limitations which prescribe the law of the land.
 "Due process of law" is process due according to the law of the land,
 and the phrase as used in the fourteenth amendment of the Federal
 Constitution with reference to the power of the States means the gen-
 eral law of the several States as fixed or guaranteed by their Consti-
 tutions. As stated by Mr. Webster, in the Dartmouth College Case,
 "the law of the land is the general law, the law which hears before
 condemns, which proceeds upon inquiry, and renders judgment only
 after trial."

If we are warranted in concluding that the new statute violates
 private right by taking the property of one and giving it to another
 without due process of law, that is really the end of this case. But
 the auspices under which this legislation was enacted, no less than
 its intrinsic importance, entitle its advocates to the fullest considera-
 tion of every argument in its support, and we therefore take up the
 discussion of the police power under which this law is sought to be
 justified. The police power is, of course, one of the necessary attri-
 butes of civilized government. In its most comprehensive sense it
 embraces the whole system by which the State seeks to preserve the

public order, to prevent offenses against the law, to insure in their intercourse with each other the enjoyment of the far as is reasonably consistent with a like enjoyment of others. Under it persons and property are subjected to all restraints and burdens in order to secure the general comfort and prosperity of the State. But it is a power which is also to the Constitution, for in a constitutional government lies the abiding principle, exhibited in its highest form in the Constitution as the deliberative judgment of the people, which moderates the claim of right and controls every use of power. In the language of Chief Justice Shaw, in *Commonwealth v. Alger*, 7 Cush. (1845): "It is much easier to perceive and realize the existence and exercise of this power than to mark its boundaries or prescribe its limits." It covers a multitude of things that are designed to protect life, limb, health, comfort, peace, and property according to the maxim "*Sic utere tuo ut alienum non laedas*," but its exercise is justified only when it appears that the interests of the public generally are distinguished from those of a particular class, require it, and the means used are reasonably necessary for the accomplishment of the desired end, and are not unduly oppressive. *Lawton v. City of Seattle*, 19 U. S. 133, 137, 14 Sup. Ct. 499, 38 L. Ed. 385; *Colon v. Lisk*, 188, 196, 47 N. E. 302, 60 Am. St. Rep. 609; *Wright v. Hart*, 193, 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338. In order to sustain the operation under the police power, the courts must be able to see that the operation tends in some degree to prevent some offense or to preserve public health, morals, safety, and welfare. If it has no such purpose, but is clearly calculated to invade the liberty and property of private citizens, it is plainly the duty of the courts to declare it invalid; for legislative assumption of the right to convert the channel into which the private energies of the citizen may be directed into a legislative attempt to abridge or hamper the right of the citizen to pursue, unmolested and without unreasonable regulation, a lawful calling or avocation which he may choose, has always been considered invalid under our form of government.

Concrete illustrations of what may and what may not be done under the police power are to be found in this very Labor Law of 1915. The new statute is a part. As this statute stood before article 10 was added, it regulated electric work, the operation of elevators and scaffolds, work with explosives and compressed air, the construction of tunnels and railroad work. It regulated the hours of work of employees; it directed the payment of wages in cash and in kind; it provided for the protection of employees engaged

erection of buildings; it compelled the employer to guard dangerous and exposed machinery, to construct fire escapes and ventilating appliances, and to provide toilet facilities, pure drinking water, and sanitary arrangements; it prohibited the employment of women, and of children under certain ages, in specified occupations; it regulated the hours of labor of minors; it modified the fellow servant rule, the law of contributory negligence and the assumption of risks; and, in short, it imposed upon the employer many restrictions and duties which were unknown to the common law. Broadly classified, all these and similar statutory provisions which are designed, in one way or another, to conserve the health, safety or morals of the employees, and to increase the duties and responsibilities of the employer, are rules of conduct which properly fall within the sphere of the police power. *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107. But the new addition to the Labor Law is of quite a different character. It does nothing to conserve the health, safety, or morals of the employees, and it imposes upon the employer no new or affirmative duties or responsibilities in the conduct of his business. Its sole purpose is to make him liable for injuries which may be sustained wholly without his fault, and solely through the fault of the employee, except where the latter fault is such as to constitute serious and willful misconduct. Under this law, the most thoughtful and careful employer, who has neglected no duty, and whose workshop is equipped with every possible appliance that may make for the safety, health, and morals of his employees, is liable in damages to any employee who happens to sustain injury through an accident which no human being can foresee or prevent, or which, if preventable at all, can only be prevented by the reasonable care of the employee himself. That this is the unmistakable theory and purpose of the Act is made perfectly plain by the recital in § 215, which sets forth that from the nature, conditions, or means of prosecution of the work in the employments which are classified as dangerous, "extraordinary risks to the life and limb of workmen engaged therein are inherent, necessary or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen." And to make the matter still more plain, the learned counsel for the commission argues in his brief that "if it is competent for the Legislature to say to the employer in a dangerous trade, 'use the utmost care in giving your workmen safe work, so that no act of yours, or implement of yours, or work that you set them to do shall hurt them, and if you fail you shall be liable for damages,' if it is

competent to make such a law, then it is equally competent to do so in this new Act directly, 'You shall be responsible for all damages caused by unsafe condition of work,' and that is just what the new Act means for trade risks under the new Act means."

In this argument the learned counsel ignores, or at least misrepresents, we think, the vital distinction between legislation which imposes on an employer a legal duty, for the failure to perform which he is penalized or rendered liable in damages, and legislation which makes him liable notwithstanding he has faithfully observed every condition imposed upon him by law. At pages 46 and 47 of the report of the commissioners are quoted the several pertinent provisions of our Constitution. Article 1, § 18; article 1, § 2; article 1, § 1; and article 1, § 6. With reference to these, the commissioners say: "It is apparent on a mere reading, that the first section makes it impossible for the Legislature to enact any law which will take away from the representatives of an injured workman the right of action there naturally accruing in injuries causing death, nor can the Legislature limit it in any other way. It is equally obvious, it seems to us, that it was the intention of the second section of the Constitution (article 1, § 2), to provide for the trial of all controversies in the courts of law either side should finally obtain a right to a jury trial on the question of liability, and however successful or unsuccessful jury trials may be in cases of employment liability, or in other cases, that solemn mandate of the Constitution cannot be set aside. The third and fourth sections of the Constitution above quoted are practically those which, like the fourth amendment of the Federal Constitution, provide for due process of law in all legislation; that is, speaking generally, which prohibit the passage by the Legislature of such legislation as shall arbitrarily deprive any of the citizens of the state of life, liberty or property."

These are interesting and salient admissions, but the error into which these constitutional provisions are brushed aside is still more apparent. Continuing, the commissioners say: "But we regard it as axiomatic that the Legislature has power, if it so chooses, to change or amend the common law on employer's liability, or the Employer's Liability Act, or any other statutes in regard thereto. * * * The Legislature of this State, in the exercise of its general powers, * * * has in the past so legislated as to prescribe that employers in New York in the conduct of their business shall conduct their business, use their machines, and use their property in such ways as shall conduce to the safety of the employees and the prevention of accident and disease. Such is the whole purpose of the Labor Law. * * * We are of opinion that it is competent for the Legislature to take a further step and provide conditions of the

ing on of such dangerous industries—not at the moment conditions as to the method of carrying them on—but conditions providing that any man in the State who carries on such dangerous trades shall be liable to make compensation to the employees injured either by the fault of the employer or by those unavoidable risks of the employment. The effect of such a statute would be to reverse the common-law doctrine that the employee assumes the risk of his employment.”

With all due respect to the members of the commission, we beg to observe that the statute enacted in conformity with their recommendations does not stop at reversing the common law. It attempts to reverse the very provisions of the Constitution which, the commissioners admit, are obviously beyond the reach of the Legislature. We cannot understand by what power the Legislature can take away from the employer a constitutional guaranty of which the employee may not also be deprived. If it is beyond the power of the Legislature to take from the representatives of deceased employees their rights of action under the Constitution, by what measure of power or justice may the Legislature assume to take from the employer the right to have his liability determined in an action at law? Conceding, as we do, that it is within the range of proper legislative action to give a workman two remedies for a wrong, when he had but one before, we ask: By what stretch of the police power is the Legislature authorized to give a remedy for no wrong? If, before the passage of this law, the employer had a right to a jury trial upon the question of liability, where and how did he lose it? Can it be taken from him by the mere assertion that this statute only reverses the common-law doctrine that the employee assumes the risk of his employment? It would be quite as logical and effective to argue that this legislation only reverses the laws of nature, for in everything within the sphere of human activity the risks which are inherent and unavoidable must fall upon those who are exposed to them. We must admit that what the Legislature may prohibit it may absolutely control. Where the right to exist, as in case of corporations, depends upon the will of the Legislature, that right may be granted subject to prescribed conditions. In such a case an employer may be made an insurer of the safety of his employees as a condition of the permission to engage in business. But when an industry or calling is *per se* lawful and open to all, and therefore beyond the prohibitive power of the Legislature, the right of governmental control is subject to such reasonable enactments as are directly designed to conserve health, safety, comfort, morals, peace, and order. *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937. For the failure of an employer to ob-

serve such regulations, the Legislature may unquestionably impose direct penalties or create presumptions of fault which, if not supported by proof, may be regarded as sufficient evidence of liability. That must be the extreme limit of the police power, beyond is the Constitution, which, in substance and effect, requires that a citizen shall be penalized or subjected to liability unless he has violated some law or has been guilty of some fault.

The limitations of the police power are illustrated in a variety of cases. In *Matter of Jacobs*, 98 N. Y. 98, 99, 50 Am. Rep. 34, it was held that an Act was void which made it a misdemeanor to manufacture cigars or prepare tobacco in certain tenements. In *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34, this court condemned an Act absolutely prohibiting the manufacture or sale of margarine, upon the ground that it interfered with a lawful business, not injurious to the public and not fraudulently conducted, in a later case (*People v. Arensberg*, 105 N. Y. 123, 11 N. E. 483) another statute relating to the same subject was upheld because it was directly aimed at a designed and intentional adulteration of dairy butter. In *People v. Gillson*, 109 N. Y. 389, 11 N. E. 343, 4 Am. St. Rep. 465, it was held that a statute was within the police power which prohibited the sale or disposal of an article of food upon any representation or inducement that it was otherwise than as it else will be delivered as a gift, prize, premium, or reward to the purchaser. The ground of the decision was that it was not a health law, that it was not designed to prevent the adulteration of food; it was not in the power of the Legislature to convert an innocent business into a crime. In *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302, 10 Am. St. Rep. 609, the statute under consideration provided for the summary seizure of any boat or vessel, used by one person in connection with the oysters or shell fish of another, and for its forfeiture. It was held that the statute sanctioned an unauthorized confiscation of private property for the mere protection of private rights, and was not within the police power of the State. In *People v. Hawley*, 111 N. Y. 1, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736, it was decided that a statute was void which made it a misdemeanor to store or expose for sale any goods made in a penal institution unless they were labeled "convict made." In *People v. Orange County Lumber Co.*, 175 N. Y. 84, 67 N. E. 129, 65 L. R. A. 33, it was held that the State cannot dictate to independent contractors on state contracts the hours of labor which they shall prescribe for their employees, where there was nothing in the character of the work or in the terms of the contract to justify legislative interference. In *Beard*

Y., L. E. & W. R. R. Co., 162 N. Y. 230, 56 N. E. 488, what is known as the "Mileage Book Act," which required railroad companies to issue mileage books and provided a penalty for refusal, was unconstitutional as to railroad corporations in existence at the time of its enactment, because it was an illegal invasion of the vested property rights of such corporations. In *Schnaier v. Navarre Hotel & I. Co.*, 182 N. Y. 88, 74 N. E. 561, 70 L. R. A. 722, 108 Am. St. Rep. 790, the court pronounced invalid a statute which provided that it should be unlawful for a copartnership to engage in the business of employing or master plumber unless each and every member thereof shall have registered, after examination and certification by an examining board of plumbers. In *People v. Marcus*, 185 N. Y. 257, 77 N. E. 1073, 7 L. R. A. (N. S.) 282, 113 Am. St. Rep. 902, it was held that a section of the Penal Code was void which provided, in substance, that no person shall make the employment of another, or the continuance of such employment, conditional upon the employee's not joining or becoming a member of a labor organization. In *People v. Williams*, 189 N. Y. 131, 134, 81 N. E. 778, 12 L. R. A. (N. S.) 1130, 121 Am. St. Rep. 354, this court condemned that part of the Labor Law which prohibited the employment of an adult female in a factory before 6 o'clock in the morning or after 9 o'clock in the evening, and held that it was not a proper exercise of the police power, since it had no reference to the number of hours of labor or to the healthfulness of the employment.

We have yet to consider certain special cases upon which the exponents of this new law have planted their faith and hope, and these run along such divergent lines as to indicate, more clearly than anything else, the absence of any sound legal theory upon which this legislation can be sustained. These cases are cited in support of the contention that the common law and our statutes furnish many illustrations of legal liability without fault; but we shall endeavor by analysis to show how inapplicable they are to the questions now before the court. The case of *Marvin v. Trout*, 199 U. S. 212, 224, 26 Sup. Ct. 31, 34 (50 L. Ed. 157), arose under an Ohio statute which subjected premises used for gambling to a lien for money lost in gambling. The statute forbade gambling, and the court very properly argued that: "The power of the State to enact laws to suppress gambling cannot be doubted, and, as a means to that end, we have no doubt of its power to provide that the owner of the building in which gambling is conducted, who knowingly looks on and permits such gambling, can be made liable in his property which is thus used, to pay a judgment against those who won the money, as is provided in

the statute. * * * The liability of the owner of the building to make good the loss sustained, under the circumstances set forth in the statute, was clearly part of the means resorted to by the Legislature for the purpose of suppressing the evil in the interests of the public morals and welfare." A more cogent illustration of the undoubted application of the police power cannot be found. In the interest of good morals it is not merely the right but the duty of the State to suppress gambling, and the case, so far from being an authority for the idea of liability without fault, proceeds directly upon the theory that the owner was at fault in permitting his premises to be used for an illegal purpose. Then there is the case of *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323, in which this court upheld the so-called "Civil Damage Act," which gave to every husband, wife, parent, guardian, employer, or other person, who should be injured in person or property or means of support by any intoxication of any person, a right of action against any person who by selling or giving away intoxicating liquors caused the intoxication, in whole or in part, and subjecting to the same liability any person or persons owning or renting or permitting the occupation of any building or premises with knowledge that intoxicating liquors were to be sold thereon. In that case, as in the case of *Marvin v. Trout*, *supra*, the controlling principle was that the State had the right to prohibit and, therefore, the absolute right to control. As Judge Andrews pertinently observed: "The right of the State to regulate the traffic in intoxicating liquors, within its limits, has been exercised from the foundation of the government, and is not open to question. The State may prescribe the persons by whom and the conditions under which the traffic may be carried on. It may impose upon those who act under its license such liabilities and penalties as in its judgment are proper to secure society against the dangers of the traffic and individuals against injuries committed by intoxicated persons under the influence of or resulting from their intoxication." Page 517 of 74 N. Y. (30 Am. Rep. 323). The defendant in that case, it is true, was not the licensee, but he had rented his premises for the traffic in intoxicating liquors knowing that they were to be so used. Upon that feature of the case Judge Andrews said: "The liability imposed upon the landlord for the acts of the tenant is not a new principle in legislation. His liability only arises when he has consented that the premises may be used as a place for the sale of liquors. He selects the tenant, and he may, without violating any constitutional provision, be made responsible for the tenant's acts connected with the use of the leased property." Page 525 of 74 N. Y. (30 Am. Rep. 323). That is very far from being a case of liability

without fault. The enactment of the "Civil Damage Act" was clearly within the police power, and the liability imposed did not deprive either the tenant or the landlord of "due process of law," for each had the right to his day in court and an opportunity to disprove the facts upon which the statutory right of action depended. Let us suppose, however, that the statute had gone so far as to provide that the mere fact of selling liquor by the tenant, or the mere fact of renting the premises for that purpose by the landlord, should be deemed conclusive proof of the intoxication of the person to whom the liquor was sold, and of the fact that the person bringing the suit had suffered injury thereby, so that the person sued could not be heard to deny or disprove his responsibility for the intoxication or the injuries resulting therefrom. Would that be "due process of law?" Suppose that the Ohio statute, which was also clearly within the general scope of the police power, had imposed upon the landlord a liability for money lost in gambling on his premises without his knowledge of the purpose for which the building was used, and had declared that evidence of the mere loss of the money should be sufficient to sustain judgment against him. That would clearly be a case of liability without fault; but what court, controlled by constitutional limitations, would render such a judgment? We are referred to the case of *Chicago, R. I. & P. Ry. Co. v. Zerneck*, 183 U. S. 582, 22 Sup. Ct. 9, 46 L. Ed. 339, as an illustration of liability without fault. We think that case has no analogy to the case at bar. There a statute in Nebraska imposed upon railroad corporations a liability for all injuries to passengers except when occasioned by the criminal negligence of the person injured, or when the injury was sustained in the violation of some express rule or regulation of the corporation. The point decided in that case was that this rule of liability was a part of the very statute under which the corporation took its charter. The defendant in the case at bar is a railroad corporation, and as such may be subject to State regulations which would not apply to other corporations or to individuals; but we are not now concerned with that question, since the statute before us has reference to employers in their relations with their employees, and not to railroads in their service to the public.

In support of this new statute we are also asked to consider the proposed analogies of the law of deodands, the common-law liability of the husband for the torts of his wife, the liability of the master for the acts of his servant, and the liability of a ship for the care and maintenance of sick or disabled seamen. From the historical point of view, these subjects might be very entertainingly elaborated, but for

the practical purposes of this discussion they may be very briefly disposed of. If the law of deodands was ever imported into this country it has never, to our knowledge, found expression in a single statute or judicial decision. It was one of those primitive conceptions of justice under which a chattel which caused the death of a human being was forfeited to the king. We are unable to see what bearing it can have upon the question whether, under our Constitutions, it is due process of law to render a man liable for damages when he has been guilty of no fault. Quite as far-fetched seems the argument based upon the common-law liability of the husband for the torts of his wife. Under the common-law unity of husband and wife, the latter was presumed to act under the compulsion of the former; and the wife could never be sued alone. As the marriage vested the husband with the personal property of the wife, it was simply logical that he should pay her obligations. So, with the liability of the master for the acts of his servant, the whole theory is expressed in the maxim *qui facit per alium facit per se*. He who acts through another acts himself. How do these illustrations support the principle of liability without fault? Could a husband or master be held liable under the common law when the wife or servant had been guilty of no wrong? Would the common law have denied to the husband or master the right to provide that no tort had been committed by the wife or servant?

The admiralty cases of *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, *The City of Alexandria* (D. C.) 17 Fed. 399, and the case of *Scarff v. Metcalf*, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. Rep. 807, seem to us equally inapplicable as authorities for the proposition that the law recognizes liability without fault. It is common knowledge that the contracts and services of seamen are exceptional in character. A seaman engages for the voyage. He is subject to physical discipline, and exposed to hardships and dangers peculiar to the sea. He is, in effect, a coadventurer with the master, and shares in the risks of shipwreck and capture, often losing his wages by casualties which do not affect workmen on land. For these and many other obvious reasons the maritime law has wisely and benevolently built up peculiar rights and privileges for the protection of the seaman which are not cognizable in the common law. When he is sick or injured he is entitled to be cared for at the expense of the ship, and, for the failure of the master to perform his duty in this regard, the ship or the owner is liable. That is a right given to the seaman, and a duty enjoined upon the master, by the plainest dictates of justice, which arises out of the necessities of the case; and, because of the reason of the rule, the right and duty cease when the contract has

terminated and the seaman has been returned to the port of shipment or discharge, or has been furnished with means to do so. But, beyond this duty on the part of the master or owner, there seems to be no liability whatever for injuries sustained by the seaman in the course of his work. We think it may confidently be asserted that within the whole range of the maritime law there will be found no rule which renders master, owner, or ship liable in damages for an injury sustained by the seaman without fault on the part of any one, or without any fault except his own. The case of *Scarff v. Metcalf*, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. Rep. 807, was not disposed of upon any such theory, but was based upon the neglect of the master to perform the duty of caring for the injured seaman imposed by the maritime law. The legal status of seamen is clearly illustrated in the case of *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715, where it was held that compulsory personal service of a seaman in performance of his contract was not a violation of the thirteenth amendment to the Federal Constitution forbidding slavery or involuntary servitude. In that case the learned justice who wrote for the court suggested that enforced service under a seaman's contract was not involuntary within the Constitution, although the contract would not be enforced by the courts. But in the later case of *Clyatt v. United States*, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726, it was held that peonage or enforced service, whether under a voluntary contract of service or not, was involuntary servitude and forbidden by the Constitution in all cases save those arising out of the exceptional relations of the seaman to his ship, the child to its parents, and the apprentice to his master. In the review in *Robertson v. Baldwin*, *supra*, of the various decisions in admiralty, it is made quite clear that the courts have always regarded seamen as irresponsible to a degree which makes them incapable of fully protecting their own rights. With the power given to the employer of seamen to compel specific performance of their contracts, there are imposed certain obligations unknown to any other relation. It is a relation which rests on affirmative law and not on natural right. We can find no analogy between a case arising out of such a relation and one in which an adult of sound mind and capable of freely contracting for himself voluntarily enters upon employment from which he is at liberty to withdraw whenever he will.

Great reliance is placed upon the case of *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611, in support of the contention that there may be liability where there is no delinquency. That was an action brought by an owner of land

adjoining the defendant's railroad to recover damages for the destruction of his dwelling house and other buildings, caused by fire which spread from sparks emitted by the defendant's locomotives. The action was brought under a statute of the State of Missouri which provided that "each railroad corporation, owning or operating a railroad in this State, shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated, directly or indirectly, by locomotive engines in use upon the railroad owned or operated by such railroad corporation; and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf, for its protection against such damages." The statute was upheld as being within the legislative power of the State. That decision is amply supported by a number of reasons which have no application to the controversy at bar. To begin with, the Constitution of Missouri contained a clause, which was in force when the railroad company obtained its charter, providing that "the exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the State." Missouri Const. art. 12, § 5. Another ample reason is found in the fact that railroads alone "have the privilege of taking a narrow strip of land from each owner, without his consent, along the route selected for the track, and of traversing the same at all hours of the day and night, and at all seasons whether wet or dry, with locomotive engines that scatter fire along the margin of the land not taken, thereby subjecting all combustible property to extraordinary hazard of loss." *Grissell v. Housatonic R. R. Co.*, 54 Conn. 447, 9 Atl. 137, 1 Am. St. Rep. 138. Then, again, "the right to use the agencies of fire and steam in the movement of trains is derived from legislation of the State; and it certainly cannot be denied that it is for the State to determine what safeguards must be used to prevent the escape of fire, and to define the extent of the liability for fires resulting from the operation of trains by means of steam locomotives. This is a matter within State control." *Hartford Ins. Co. v. Chi., Mil. & St. Paul Ry. Co.* (C. C.) 62 Fed. 904. The Legislature may, if it chooses, make it a condition of the right to run carriages propelled by the agency of fire that the corporation employing them shall be responsible for all injuries which fire may cause. *Ingersoll & Quigley v. Stockbridge & Pittsfield R. R. Co.*, 8 Allen (Mass.) 438; *Grand Trunk Ry. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356. And, finally, these statutes are designed to

protect the rights of those who have no contractual relations to the corporations which inflict the injury. In such a case, when both parties are equally faultless, the Legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of the dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property who has no control over or interest in these instruments. Quite aside from the considerations which support such a statutory liability against railroad corporations, it may be added that it is in no sense an extension of the rule of the common law to modern conditions, but in reality a return to the original common-law doctrine under which every person who permitted fire started by him to escape beyond his house or close was liable to every one who suffered loss or injury thereby. The severity of that early English rule was moderated by numerous statutes, among which are 6 Anne and 14 Geo. III. As to these two last-mentioned statutes it has been held that they became by adoption a part of the common law of this State (Thompson's Negligence, vol. 1, p. 148 et seq., notes under "Liability for Damages by Fire," and Webb v. R., W. & O. R. R. Co., 49 N. Y. 420, 426, 10 Am. Rep. 389), under which neither individuals nor corporations are liable for escaping fire unless there is negligence (Clark v. Foot, 8 Johns. 421; Bennett v. Scutt, 18 Barb. 347, 349; Stuart v. Hawley, 22 Barb. 619, 621; Radcliff's Ex'rs v. Mayor, etc., of Brooklyn, 4 N. Y. 195, 200, 53 Am. Dec. 357; Calkins v. Barger, 44 Barb. 424; Sheldon v. Hudson R. R. Co., 14 N. Y. 219, 67 Am. Dec. 155; Steinweg v. Erie Ry. 43 N. Y. 123, 127, 3 Am. Rep. 673). The cited cases arising out of injuries inflicted by animals of known dangerous or vicious propensities, and the liability which has often been imposed for the maintenance of private nuisances, we shall not discuss, for we think they are governed by well-settled principles which clearly have no application to the questions now before us.

In the addenda to the instructive brief of the counsel for the commission our attention is called to three decisions of the Federal Supreme Court which have been but recently decided. Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062; Assaria State Bank v. Dolley, 219 U. S. 121, 31 Sup. Ct. 189, 55 L. Ed. 123; and Engel v. O'Malley, 219 U. S. 128, 31 Sup. Ct. 190. These cases, it is contended, strongly support the validity of the legislation which we are condemning because, as counsel asserts, they go directly to the ultimate question: "Is the Act an unreasonable regulation of the *status* of employment?" We have

tried to make it clear that in our judgment this statute is not a law of regulation. It contains not a single provision which can be said to make for the safety, health or morals of the employees therein specified, nor to impose upon the enumerated employers any duty or obligation designed to have that effect. It does not affect the *status* of employment at all, but writes into the contract between the employer and employee, without the consent of the former, a liability on his part which never existed before and to which he is permitted to interpose practically no defense, for he can only escape liability when the employee is injured through his own willful misconduct. That is a defense which needs no legislative sanction, since it would be abhorrent to the most primitive notions of justice to permit one to impose liability for his willfully self-inflicted injuries upon another who is wholly free from responsibility for them. The case of *Engel v. O'Malley*, *supra*, is so clearly distinguishable from the case at bar that we need only state the facts to mark the contrast. The *Engel* Case arose under a New York statute which provides that individuals and firms shall not engage in the business of receiving deposits for safe-keeping or for transmission, or for any other purpose, or in the business of banking, without first obtaining from the State comptroller a license. The same statute further provides that applicants for such a license must pay a prescribed fee, give bonds, and submit to other restrictions. We have already passed upon the constitutionality of certain parts of that statute (L. 1907, c. 185) in *Musco v. United Surety Co.*, 196 N. Y. 459, 465, 90 N. E. 171, 173 (134 Am. St. Rep. 851), which was an action upon a bond given under it, and have held that "the regulation of the business of receiving deposits is plainly within the power possessed by the State to regulate the conduct of various pursuits when necessary for the protection of the public." The portion of the statute under consideration in the last-cited case was plainly directed against an obvious evil which vitally affected the public welfare. The city of New York is the gateway through which this country admits each year thousands of poor and ignorant immigrants who deal with individuals and firms engaged in the business of exchanging domestic for foreign money, receiving deposits and transmitting remittances to foreign ports. It is a business which may, and probably does, attract some irresponsible and mercenary adventurers. A law designed to regulate and safeguard such a business in a way which affects no constitutional property rights is plainly within the police power of the State. That is all that was involved in the *Musco* Case, and that is the extent to which this court has passed upon the constitutionality of the New York statute (L. 1907, c. 185). It need

hardly be argued that a law passed under the guise of such a purpose, but having in fact no relation to it, and accomplishing nothing to make the business of receiving deposits more safe, would be as far beyond the sphere of the police power as an amendment to the banking law requiring banks and bankers to protect their customers, to whom they pay moneys, against thefts or other physical losses hereof; or an amendment to the labor law which would compel the industrial employers to give each employee a vacation on full pay during two months of every year.

As to the cases of *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, and *Assaria State Bank v. Dolley*, 219 U. S. 121, 31 Sup. Ct. 189, 55 L. Ed. 123, we have only to say that if they go so far as to hold that any law, whatever its effect, may be upheld because by the "prevailing morality" or the "strong and preponderant opinion" it is deemed "to be greatly and immediately necessary to the public welfare," we cannot recognize them as controlling of our construction of our own Constitution. That the business of banking in the several States may be regulated by legislative enactment is too obvious for discussion. That the extent to which such State regulation may be carried must depend upon the difference in constitutional provisions is also plain. How far these State decisions of the Federal Supreme Court are to be regarded as committing that tribunal to the doctrine that any citizen may be deprived of his private property for the public welfare we are not prepared to decide. All that it is necessary to affirm in the case before us is that in our view of the Constitution of our State the liability ought to be imposed upon the employers enumerated in the statute before us is a taking of property without due process of law, and the statute is therefore void.

The judgment of the Appellate Division should be reversed, and judgment directed for the defendant, with costs in all courts.

CULLEN, C. J., and GRAY, HAIGHT, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur. CULLEN, C. J., also files an opinion, with whom WILLARD BARTLETT, J., concurs.

CULLEN, C. J. I concur in the opinion of Judge Werner for reversal of the judgment appealed from. I concede that the Legislature may abolish the rule of fellow servant as a defense to an action by employee against the employer. Indeed, we have decided that in upholding the so-called "Barnes Act." *Schradin v. N. Y. C. & H. R. R. Co.*, 194 N. Y. 534, 87 N. E. 1126. I concede that the Legisla-

ture may also abolish as a defense the rule of assumption of risk and that of contributory negligence unless the accident proceed from the willful act of the employee. I concede that in a work, occupation, or business of such a nature that the Legislature might prohibit its pursuit or exercise altogether, the Legislature may prescribe terms under which it may be carried on. Plainly, this litigation does not present such a case. The Legislature could not revoke the franchise it had previously given to the defendant to operate a railroad. *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684. I am not prepared to deny that where the effects of the work, even though prosecuted carefully, go beyond a person's own property and injure third persons in no way connected therewith, the person for whose account the work is done may be held liable for injuries occasioned thereby. I also concede the most plenary power in the Legislature to prescribe all reasonable rules for the conduct of the work which may conduce to the safety and health of persons employed therein. But I do deny that a person employed in a lawful vocation, the effects of which are confined to his own premises, can be made to indemnify another for injury received in the work unless he has been in some respect at fault. I am not impressed with the argument that "the common law imposed upon the employee entire responsibility for injuries arising out of the necessary risks or dangers of the employment. The statute before us merely shifts such liability upon the employer." It is the physical law of nature, not of government, that imposes upon one meeting with an injury, the suffering occasioned thereby. Human law cannot change that. All it can do is to require pecuniary indemnity to the party injured, and I know of no principle on which one can be compelled to indemnify another for loss unless it is based upon contractual obligation or fault. It might as well be argued in support of a law requiring a man to pay his neighbor's debts that the common law requires each man to pay his own debts, and the statute in question was a mere modification of the common law so as to require each to pay his neighbor's debts. It is urged that the legislation before us can be upheld on the decision of the Supreme Court of the United States in *Noble State Bank v. Haskell*, 219 U. S. 104, 111, 31 Sup. Ct. 186, 188, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062. In support of the claim there is cited from the opinion the following: "It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518 [17 Sup. Ct. 864, 42 L. Ed. 260]. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately neces-

sary to the public welfare." It is possible that the doctrine of these two sentences would justify the statute before us and possibly any legislation, if only supported by a sufficient popular demand, but it is both unfair and unsafe to excerpt fragmentary sentences from the opinion of a court and interpret them apart from the context of the whole opinion. However that may be, the decision in the Noble Bank Case is not controlling upon this court in the construction of the Constitution of our own State, and I am not disposed to accept it, at least, until it has received the approval of a majority of the court. I concur with Judge Werner that the Act, as applicable to the case before us, cannot be considered as an exercise of the power of the State to regulate corporations. The Act is general, not confined to corporations, and, even if it were, I think its effect would be a deprivation of property not authorized by the reserved power to regulate.

As to corporations hereafter formed, the question is very different. The franchise to be a corporation is not one inherent in the citizen, but proceeds solely from the bounty of the Legislature, and for that reason the Legislature may dictate the terms on which it will be granted and require the acceptance of the provisions of this Act as a condition of incorporation. *Purdy v. Erie R. R. Co.*, 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669; *Minor v. Erie R. R. Co.*, 171 N. Y. 566, 64 N. E. 454; *People ex rel. Schurz v. Cook*, 110 N. Y. 443, 18 N. E. 113; *s. c.*, 148 U. S. 397, 13 Sup. Ct. 645, 37 L. Ed. 498; *Chicago, R. I. & Pac. R. Co. v. Zerneck*, 183 U. S. 582, 22 Sup. Ct. 229, 46 L. Ed. 339. Even in the case of existing corporations, the corporate existence of all those created since the Constitution of 1846 may be revoked by the Legislature, though the property rights of such corporations and their special franchises other than the one to be a corporation cannot be impaired. Const. art. 8, § 1; *Lord v. Equitable Life Assur. Soc.*, 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420. The property and franchise would have to be managed by the owners as partners or tenants in common, and the Legislature might require as a condition of the continued right to be a corporation that before the expiration of a reasonable period the provisions of the statute should also be accepted by them. They are in the condition of a tenant at will who, when the landlord raises the rent, must either comply with his terms or, after the expiration of a reasonable time prescribed by a notice to quit, surrender his rights under the lease. But individual citizens, following the ordinary vocations of life, asking no favors of the government, whether a corporate or other franchise, but only the protection of life and property, which every government owes to its citizens, and guilty of no fault, cannot be compelled to contribute to

the indemnity of other citizens who, by misfortune or the fault of themselves or others, have suffered injuries, except by the exercise of the power of taxation imposed on all, at least all of the same class, for the maintenance of public charity. Of course, I am not now referring to obligations springing from domestic relations.

Judgment reversed, etc.

OPINION OF JUSTICES

As to the Constitutionality of the Workingmen's Compensation Bill.

[SUPREME JUDICIAL COURT OF MASSACHUSETTS, JULY 24, 1911.]

209 Mass. 607.

1. Master and Servant—Workingmen's Compensation Bill—Constitutionality.

A bill (Workingmen's Compensation Bill, Part I, § 1) which provides that, in an action brought to recover damages for personal injuries to or death of an employee, it shall be no defense that he was negligent, or that the injury was caused by the negligence of a fellow employee, or that the risk was assumed, when construed as meaning contributory negligence or negligence of a fellow servant which falls short of serious and wilful misconduct, is constitutional.

2. Master and Servant—Liability of Master—Contributory Negligence—Assumption of Risk—Statute.

The rules relating to contributory negligence and assumption of risk, and the effect of the negligence of a fellow servant, having been established by the courts and not by the Constitution, it is within the power of the Legislature to change or repeal such rules as defenses, as in its wisdom it deems best for the welfare of the commonwealth.

3. Master and Servant—Workingmen's Compensation Bill—Constitutionality—Vested Right of Action.

The Workingmen's Compensation Bill, by express terms, does not apply to injuries sustained by an employee before the bill took effect, and, therefore, a right of action for a personal injury which accrued under existing laws constitutes a vested right which is not affected by section 1 of part I of said bill, which provides that, in an action for an injury to or death of an employee, it shall be no defense that he was negligent, or that the injury was caused by the negligence of a fellow employee.

Opinion rendered by the Justices of the Supreme Judicial Court upon application by the State Senate for an opinion as to the constitutionality of chapter 751 of the Laws of 1911, which is known as the Workingmen's Compensation Bill.

The following order, the consideration of which had been postponed from the preceding session, was on July 18, 1911, considered by the Senate, as shown by its journal, to wit:

"Whereas, there is now before the Senate a bill entitled 'An act relative to payments to employees for personal injuries received in

NOTE.

On the subject of the Constitutionality of Workmen's Compensation Acts, see note to CUNNINGHAM v. NORTHWEST-

ERN IMPROVEMENT Co., — Mont. —, 119 Pac. 554 (1911) reported in this volume of Negligence and Compensation Cases Annotated (1 N. C. C. A.), p. 720, post.

4. Master and Servant—Workingmen's Compensation Bill—Constitutionality—Due Process of Law.

Workingmen's Compensation Bill, part I, § 1, which provides that in an action for injury to or death of an employee, it shall be no defense that he was negligent, or that he assumed the risk, or that the injury was caused by the negligence of a fellow employee, is not invalid as authorizing the taking of property without due process of law.

5. Master and Servant—Workingmen's Compensation Bill—Domestic Servants and Farm Laborers—Constitutionality.

Workingmen's Compensation Bill, Part I, § 2, providing that § 1 of such bill which declares that in an action for injury to or death of an employee, it shall be no defense that the employee was negligent, or that the injury was caused by the negligence of a fellow employee, or that he assumed the risk of injury, shall not apply to domestic servants and farm laborers, is not unconstitutional.

6. Master and Servant—Workingmen's Compensation Bill—Due Process of Law.

A Workingmen's Compensation Bill, which is not compulsory in character as applied to employers and employees, does not violate any provision of the Federal or State Constitutions concerning the taking of property without due process of law.

7. Master and Servant—Workingmen's Compensation Bill—Employee's Waiver of Rights—Validity.

The section of a Workingmen's Compensation Bill which provides that no agreement by an employee waiving his right to compensation under such bill shall be valid, is constitutional.

8. Constitutional Law—Liability Insurance Companies—Risks—Workingmen's Compensation Bill.

A Workingmen's Compensation Bill which does not require liability insurance companies to insure risks under such bill, is not unconstitutional because it requires that such companies and policy holders, if policies are issued under such bill, shall be governed by the bill so far as applicable.

the course of their employment and to the prevention of such injuries,' being House Document No. 2154; and

"Whereas, no similar legislation has ever been enacted in this Commonwealth; and

"Whereas, an Act for a similar purpose was enacted in the State of New York, and has been decided to be in violation of the Constitution of the State of New York and of the Fourteenth Amendment to the Constitution of the United States; and

"Whereas, there appears to be no precedent bearing on said subject in other jurisdictions in the United States;

"Be it ordered, that the opinion of the Justices of the Supreme Judicial Court be required on the following important questions of law:

"First. Is the said bill, House Document No. 2154, in conformity with the provisions of the Constitution of the Commonwealth of Mas-

sachusetts which requires that property shall not be taken from a citizen without due process of law?

"Second. Is the bill in conformity with the fourteenth amendment to the Federal Constitution?"

The following is the text of said bill as approved by the Governor:

"An Act relative to payments to employees for personal injuries received in the course of their employment and to the prevention of such injuries.

"Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

"PART I.

"MODIFICATION OF REMEDIES.

"Section 1. In an action to recover damages for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense.

"1. That the employee was negligent;

"2. That the injury was caused by the negligence of a fellow employee;

"3. That the employee had assumed the risk of the injury.

"Section 2. The provision of section one shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers.

"Section 3. The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by employees of a subscriber.

"Section 4. The provisions of sections one hundred and twenty-seven to one hundred and thirty-five inclusive, and of one hundred and forty-one to one hundred and forty-three, inclusive, of chapter five hundred and fourteen of the Acts of the year nineteen hundred and nine, and of any Acts in amendment thereof, shall not apply to employees of a subscriber while this Act is in effect.

"Section 5. An employee of a subscriber shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer at the time of his contract of hire, notice in writing that he claimed such right, or if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice within thirty days of notice of such subscription. An employee who has given notice to his employer that he claimed his right of action at common

law may waive such claim by a notice in writing which shall take effect five days after it is delivered to the employer or his agent.

"PART II.

"PAYMENTS.

"Section 1. If an employee, who has not given notice of his claim of common law rights of action, as provided in Part 1, section five, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, he shall be paid compensation by the association as hereinafter provided, if his employer is a subscriber at the time of the injury.

"Section 2. If the employee is injured by reason of his serious and willful misconduct, he shall not receive compensation.

"Section 3. If the employee is injured by reason of the serious and willful misconduct of a subscriber or of any person regularly entrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In such case the subscriber shall repay to the association the extra compensation paid to the employee.

"Section 4. No compensation shall be paid under this Act for any injury which does not incapacitate the employee for a period of at least two weeks from earning full wages, but if incapacity extends beyond the period of two weeks, compensation shall begin on the fifteenth day after the injury.

"Section 5. During the first two weeks after the injury, the association shall furnish reasonable medical and hospital services, and medicines when they are needed.

"Section 6. If death results from the injury, the association shall pay the dependents of the employee, wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to one-half his average weekly wages, but not more than ten dollars nor less than four dollars a week, for a period of three hundred weeks from the date of the injury. If the employee leaves dependents only partly dependent upon his earnings for support at the time of his injury, the association shall pay such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments,

but shall not continue more than three hundred weeks from the date of the injury.

"Section 7. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

(a) A wife upon a husband with whom she lives at the time of his death.

(b) A husband upon a wife with whom he lives at the time of her death.

(c) A child or children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning) upon the parent with whom he is or they are living at the time of the death of such parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them.

"In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof; if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

"Section 8. If the employee leaves no dependents, the association shall pay the reasonable expense of his last sickness and burial, which shall not exceed two hundred dollars.

"Section 9. While the incapacity for work resulting from the injury is total, the association shall pay the injured employee a weekly compensation equal to one-half his average weekly wages, but not more than ten dollars nor less than four dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor the amount more than three thousand dollars.

"Section 10. While the incapacity for work resulting from the injury is partial, the association shall pay the injured employee a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than ten dollars a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury.

"Section 11. In case of the following specified injuries the amounts hereinafter named shall be paid in addition to all other compensation:

"(a) For the loss by severance of both hands at or above the wrist, or both feet at or above the ankle, or the loss of one hand and one

foot, or the entire and irrecoverable loss of the sight of both eyes, one-half of the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of one hundred weeks.

“(b) For the loss by severance of either hand at or above the wrist, or either foot at or above the ankle, or the entire and irrecoverable loss of the sight of either eye, one-half the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of fifty weeks.

“(c) For the loss by severance at or above the second joint of two or more fingers, including thumbs, or toes, one-half the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of twenty-five weeks.

“(d) For the loss by severance of at least one phalanx of a finger, thumb, or toe, one-half the average weekly wages of the injured person, but not more than ten dollars and not less than four dollars a week, for a period of twelve weeks.

“Section 12. No savings or insurance of the injured employee, independent of this Act, shall be taken into consideration in determining the compensation to be paid hereunder, nor shall benefits derived from any other source than the association be considered in fixing the compensation under this Act.

“Section 13. The compensation payable under this Act in case of the death of the injured employee shall be paid to his legal representative; or, if he has no legal representative, to his dependents; or, if he leaves no dependents, to the persons to whom payment of the expenses for the last sickness and burial is due. If the payment is made to the legal representative of the deceased employee, it shall be paid by him to the dependents or other persons entitled thereto under this Act.

“Section 14. If an injured employee is mentally incompetent or is a minor at the time when any right or privilege accrues to him under this Act, his guardian or next friend may in his behalf claim and exercise such right or privilege.

“Section 15. No proceedings for compensation for an injury under this Act shall be maintained unless a notice of the injury shall have been given to the association or subscriber as soon as practicable after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity.

"Section 16. The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury; and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his legal representative, or by a person in his behalf.

"Section 17. The notice shall be served upon the association, or an officer or agent thereof, or upon the subscriber, or upon one subscriber if there are more subscribers than one, or upon any officer or agent of a corporation, if the subscriber is a corporation, by delivering the same to the person on whom it is to be served, or leaving it at his residence or place of business, or by sending it by registered mail addressed to the person or corporation on whom it is to be served, at his last known residence or place of business.

"Section 18. A notice given under the provisions of this Act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury, unless it is shown that it was the intention to mislead and the association was in fact misled thereby. Want of notice shall not be a bar to proceedings under this Act, if it be shown that the association, subscriber, or agent had knowledge of the injury.

"Section 19. After an employee has given notice of an injury, as provided by this Act, and from time to time thereafter during the continuance of his disability he shall, if so requested by the association, submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the Commonwealth, furnished and paid for by the association. The employee shall have the right to have a physician provided and paid for by himself present at the examination. If he refuses to submit himself for the examination, or in any way obstructs the same, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited.

"Section 20. No agreement by an employee to waive his rights to compensation under this Act shall be valid.

"Section 21. No payment under this Act shall be assignable or subject to attachment, or be liable in any way for any debts.

"Section 22. Whenever any weekly payment has been continued for not less than six months, the liability therefor may in unusual cases be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of the industrial accident board.

"PART III.**"PROCEDURE.**

"Section 1. There shall be an Industrial Accident Board consisting of three members, to be appointed by the Governor, by and with the advice and consent of the council, one of whom shall be designated by the Governor as chairman. The term of office of members of this board shall be six years, except that when first constituted one member shall be appointed for two years, one for four years, and one for six years. Thereafter one member shall be appointed every second year for the full term of six years.

"Section 2. The salaries and expenses of the board shall be paid by the Commonwealth. The salary of the chairman shall be sixty-five hundred dollars a year, and the salary of the other members shall be six thousand dollars a year each. The board may appoint a secretary at a salary of not more than three thousand dollars a year and may remove him. It shall also be allowed an annual sum, not exceeding ten thousand dollars, for clerical service, and traveling and other necessary expenses. The board shall be provided with an office in the State House or in some other suitable building in the city of Boston, in which its records shall be kept.

"Section 3. The board may make rules not inconsistent with this Act for carrying out the provisions of the Act. Process and procedure under this Act shall be as summary as reasonably may be. The board or any member thereof shall have the power to subpoena witnesses and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute.

"Section 4. If the association and the injured employee reach an agreement in regard to compensation under this Act, a memorandum of the agreement shall be filed with the Industrial Accident Board and, if approved by it, thereupon the memorandum shall for all purposes be enforceable as a decree of the Superior Court. Such agreements shall be approved by said board only when the terms conform to the provisions of this Act.

"Section 5. If the association and the injured employee fail to reach an agreement in regard to compensation under this Act, either party may notify the Industrial Accident Board who shall thereupon call for the formation of a committee of arbitration. The committee of arbitration shall consist of three members, one of whom shall be a member of the industrial accident board and shall act as chairman. The other two members shall be named, respectively, by the two parties.

"Section 6. It shall be the duty of the Industrial Accident Board, upon notification that the parties have failed to reach an agreement, to request both parties to appoint their respective representatives on the committee of arbitration. The board shall designate one of its members to act as chairman, and, if either party does not appoint its member on this committee within seven days after notification, as above provided, the board or any member thereof, shall fill the vacancy and notify the parties to that effect.

"Section 7. The committee of arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee shall be held at the place where the injury occurred, and the decision of the committee shall be filed with the industrial accident board. Unless a claim for a review is filed by either party within seven days, the decision shall be enforceable as if it were a decree of the Superior Court.

"Section 8. The Industrial Accident Board or any member thereof may appoint a duly qualified impartial physician to examine the injured employee and to report. The fee for this service shall be five dollars and traveling expenses, but the board may allow additional reasonable amounts in extraordinary cases.

"Section 9. The arbitrators named by or for the parties to the dispute shall each receive five dollars as a fee for his services, but the Industrial Accident Board or any member thereof may allow additional reasonable amounts in extraordinary cases. The fees shall be paid by the association, which shall deduct an amount equal to one-third of the sum from any compensation found due the employee.

"Section 10. If a claim for review is filed, as provided in Part III, section seven, the board shall hear the parties and file its decision with the records of the proceedings.

"Section 11. There shall be a right of appeal to the Supreme Judicial Court on questions of law, and the Industrial Accident Board may report questions of law to the Supreme Judicial Court for its determination.

"Section 12. Any weekly payment under this Act may be reviewed by the Industrial Accident Board at the request of the association or of the employee; and on such review it may be ended, diminished or increased subject to the maximum and minimum amounts above provided, if the board finds that the condition of the employee warrants such action.

"Section 13. Fees of attorneys and physicians for services under this Act shall be subject to the approval of the Industrial Accident Board.

"Section 14. If the committee of arbitration, Industrial Accident Board, or any court before whom any proceedings are brought under this Act determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, it shall assess the whole cost of the proceedings upon the party who has so brought, prosecuted or defended them.

"Section 15. Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the association for compensation under this Act, but not against both; and if compensation be paid under this Act, the association may enforce in the name of the employee, or in its own name and for its own benefit, the liability of such other person.

"Section 16. All questions arising under this Act, if not settled by agreement by the parties interested therein, shall, except as otherwise herein provided, be determined by the Industrial Accident Board. The decisions of the Industrial Accident Board shall for all purposes be enforceable as if they were decrees of the Superior Court.

"Section 17. If a subscriber enters into a contract, written or oral, with an independent contractor to do such subscriber's work, or if such contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the subscriber, and the association would, if such work were executed by the employees immediately employed by the subscriber, be liable to pay compensation under this Act to those employees, the association shall pay to such employees any compensation which would be payable to them under this Act if the independent or sub-contractors were subscribers. The association, however, shall be entitled to recover indemnity from any other person who would have been liable to such employees independently of this section, and if the association has paid compensation under the terms of this section, it may enforce in the name of the employee, or in its own name and for the benefit of the association, the liability of such other person. This section shall not apply to any contract of an independent or sub-contractor which is merely ancillary and incidental to, and is no part of or process in the trade or business carried on by the subscriber, nor to any case where the injury occurred elsewhere than on, in, or about the premises on which the contractor has undertaken to execute the work for the subscriber or which are under the control or management of the subscriber.

"Section 18. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees, in the course of their employment. Within forty-eight hours, not counting Sundays and legal holidays, after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing to the Industrial Accident Board on blanks to be procured from the board for the purpose.

"Upon the termination of the disability of the injured employee or, if such disability extends beyond a period of sixty days, at the expiration of such period, the employer shall make a supplemental report on blanks to be procured from the board for that purpose.

"The said reports shall contain the name and nature of the business of the employer, the location of the establishment, the name, age, sex and occupation of the injured employee, and shall state the date and hour of the accident, the nature and cause of the injury, and such other information as may be required by the board.

"Any employer who refuses or neglects to make the report required by this section shall be punished by a fine of not more than fifty dollars for each offense.

"PART IV

"THE MASSACHUSETTS EMPLOYEES' INSURANCE ASSOCIATION.

"Section 1. The Massachusetts Employees' Insurance Association is hereby created a body corporate with the powers provided in this Act and with all the general corporate powers incident thereto.

"Section 2. The Governor shall appoint a board of directors of the association, consisting of fifteen members, who shall serve for a term of one year, or until their successors are elected by ballot by the subscribers at such time and for such term as the by-laws shall provide.

"Section 3. Until the first meeting of the subscribers the board of directors shall have and exercise all the powers of the subscribers, and may adopt by-laws not inconsistent with the provisions of this Act, which shall be in effect until amended or repealed by the subscribers.

"Section 4. The board of directors shall annually choose by ballot a president, who shall be a member of the board, a secretary, a treasurer, and such other officers as the by-laws shall provide.

"Section 5. Seven or more of the directors shall constitute a quorum for the transaction of business.

"Vacancies in any office may be filled in such manner as the by-laws shall provide.

"Section 6. Any employer in the commonwealth may become a subscriber.

"Section 7. The board of directors shall, within thirty days of the subscription of twenty-five employers, call the first meeting of the subscribers by a notice in writing mailed to each subscriber at his place of business not less than ten days before the date fixed for the meeting.

"Section 8. In any meeting of the subscribers each subscriber shall be entitled to one vote, and if a subscriber has five hundred employees to whom the association is bound to pay compensation he shall be entitled to two votes, and he shall be entitled to one additional vote for each additional five hundred employees to whom the association is bound to pay compensation, but no subscriber shall cast, by his own right, or by the right of proxy, more than twenty votes.

"Section 9. No policy shall be issued by the association until not less than one hundred employers have subscribed, who have not less than ten thousand employees to whom the association may be bound to pay compensation.

"Section 10. No policy shall be issued until a list of the subscribers, with the number of employees of each, together with such other information as the insurance commissioner may require, shall have been filed at the insurance department nor until the president and secretary of the association shall have certified under oath that every subscription in the list so filed is genuine and made with an agreement by every subscriber that he will take the policies subscribed for by him within thirty days of the granting of a license to the association by the insurance commissioner to issue policies.

"Section 11. If the number of subscribers falls below one hundred, or the number of employees to whom the association may be bound to pay compensation falls below ten thousand, no further policies shall be issued until other employers have subscribed who, together with existing subscribers, amount to not less than one hundred who have not less than ten thousand employees, said subscriptions to be subject to the provisions contained in the preceding section.

"Section 12. Upon the filing of the certificate provided for in the two preceding sections the insurance commissioner shall make such investigation as he may deem proper and, if his findings warrant it, grant a license to the association to issue policies.

"Section 13. The board of directors shall distribute the subscribers into groups in accordance with the nature of the business and the degree of the risk of injury.

"Subscribers within each group shall annually pay in cash, or notes

absolutely payable, such premiums as may be required to pay the compensation herein provided for the injuries which may occur in that year.

“Section 14. The association may in its by-laws and policies fix the contingent mutual liability of the subscribers for the payment of losses and expenses not provided for by its cash funds; but such contingent liability of a subscriber shall not be less than an amount equal to and in addition to the cash premium.

“Section 15. If the association is not possessed of cash funds above its unearned premiums sufficient for the payment of incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses upon the subscribers liable to assessment therefor in proportion to their several liability.

“Every subscriber shall pay his proportional part of any assessments which may be laid by the association, in accordance with law and his contract, on account of injuries sustained and expenses incurred while he is a subscriber.

“Section 16. The board of directors may, from time to time, by vote fix and determine the amount to be paid as a dividend upon policies expiring during each year after retaining sufficient sums to pay all the compensation which may be payable on account of injuries sustained and expenses incurred.

“All premiums, assessments, and dividends shall be fixed by and for groups as heretofore provided in accordance with the experience of each group, but all the funds of the association and the contingent liability of all the subscribers shall be available for the payment of any claim against the association.

“Section 17. Any proposed premium, assessment, dividend or distribution of subscribers shall be filed with the insurance department and shall not take effect until approved by the insurance commissioner after such investigation as he may deem necessary.

“Section 18. The board of directors shall make and enforce reasonable rules and regulations for the prevention of injuries on the premises of subscribers, and for this purpose the inspectors of the association shall have free access to all such premises during regular working hours.

“Any subscriber or employee aggrieved by any such rule or regulation may petition the industrial accident board for a review, and it may affirm, amend, or annul the rule or regulation.

“Section 19. If any officer of the association shall falsely make oath to any certificate required to be filed with the insurance commissioner, he shall be guilty of perjury.

"Section 20. Every subscriber shall, as soon as he secures a policy, give notice, in writing or print, to all persons under contract of hire with him that he has provided for payment to injured employees by the association.

"Section 21. Every subscriber shall give notice in writing or print to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employees by the association.

"Section 22. If a subscriber, who has complied with all the rules, regulations and demands of the association, is required by any judgment of a court of law to pay to an employee any damages on account of personal injury sustained by such employee during the period of subscription, the association shall pay to the subscriber the full amount of such judgment and the cost assessed therewith, if the subscriber shall have given the association notice in writing of the bringing of the action upon which the judgment was recovered and an opportunity to appear and defend the same.

"Section 23. The provisions of chapter five hundred and seventy-six of the Acts of the year nineteen hundred and seven and of Acts in amendment thereof shall apply to the association, so far as such provisions are pertinent and not in conflict with the provisions of this Act, except that the corporate powers shall not expire because of failure to issue policies or make insurance.

"Section 24. The board of directors appointed by the Governor under the provisions of Part IV, section two, may incur such expenses in the performance of its duties as shall be approved by the Governor and council. Such expenses shall be paid from the treasury of the Commonwealth and shall not exceed in amount the sum of fifteen thousand dollars.

"PART V.

"MISCELLANEOUS PROVISIONS.

"Section 1. If an employee of a subscriber files any claim with or accepts any payment from the association on account of personal injury, or makes any agreement, or submits any question to arbitration, under this Act, such action shall constitute a release to the subscriber of all claims or demands at law, if any, arising from the injury.

"Section 2. The following words and phrases, as used in this Act, shall, unless a different meaning is plainly required by the context, have the following meaning:

“ ‘Employer’ shall include the legal representative of a deceased employer.

“ ‘Employee’ shall include every person in the service of another under any contract of hire, express or implied, oral or written, except one whose employment is but casual, or is not in the usual course of the trade, business, profession or occupation of his employer. Any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable.

“ ‘Dependents’ shall mean members of the employee’s family or next of kin who were wholly or partly dependent upon the earnings of the employee for support at the time of the injury.

“ ‘Average weekly wages’ shall mean the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks’ time during such period then the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer, or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer; or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

“ ‘Association’ shall mean the Massachusetts Employees’ Insurance Association.

“ ‘Subscriber’ shall mean an employer who has become a member of the association by paying a year’s premium in advance and receiving the receipt of the association therefor, provided that the association holds a license issued by the insurance commissioner as provided in Part IV, section twelve.

“Section 3. Any liability insurance company authorized to do business within this Commonwealth shall have the same right as the association to insure the liability to pay the compensation provided for by this Act, and a policy holder of such liability company shall be regarded as a subscriber so far as applicable within the meaning of this Act, and when any such company insures such payment of compensation it shall be subject to all the regulations and obligations imposed upon the association,

"Section 4. Sections one hundred and thirty-six to one hundred and forty, inclusive, of chapter five hundred and fourteen of the Acts of the year nineteen hundred and nine are hereby repealed.

"Section 5. The provisions of this Act shall not apply to injuries sustained prior to the taking effect thereof.

"Section 6. Part IV of this Act shall take effect on the first day of January, nineteen hundred and twelve; the remainder thereof shall take effect on the first day of July, nineteen hundred and twelve."

OPINION OF THE JUSTICES.

To the Honorable the Senate of the Commonwealth of Massachusetts:

We have received the questions, of which a copy, with the Act referred to therein and the amendment adopted by the Senate, is hereto annexed, and after giving to them such consideration as we have been able to give in the time at our disposal, we respectfully answer them as follows:

The questions submitted to us are important, and the proposed Act involves a radical departure in the manner of dealing with actions or claims for damages for personal injuries received by employees in the course of their employment from that which has heretofore prevailed in this Commonwealth; but we think that nothing would be gained by an extended discussion and we therefore content ourselves with stating briefly the conclusions to which we have come and our reasons therefor.

The first section of the Act (part 1, § 1) provides that:

"In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

"1. That the employee was negligent;

"2. That the injury was caused by the negligence of a fellow employee;

"3. That the employee had assumed the risk of the injury."

This section deals with actions at common law. We construe clauses 1 and 2 in their reference to negligence as meaning contributory negligence or negligence on the part of a fellow servant which falls short of the serious and willful misconduct which under part 11, § 2, will deprive an employee of compensation. So construed we think that the section is constitutional. We neither express nor intimate any opinion whether it would be unconstitutional if otherwise construed. The rules of law relating to contributory negligence and assumption of the risk and the effect of negligence by a fellow servant were established by the courts, not by the Constitution, and the Legislature

may change them or do away with them altogether as defenses (as it has to some extent in the Employer's Liability Act) as in its wisdom in the exercise of powers intrusted to it by the Constitution it deems will be best for the "good and welfare of this Commonwealth." See *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 19 Am. Neg. Rep. 625, 26 Sup. Ct. 159, 50 L. Ed. 322. The Act expressly provides that it shall not apply to injuries sustained before it takes effect. If, therefore, a right of action which has accrued under existing laws for personal injuries constitutes a vested right or interest, there is nothing in the section which interferes with such rights or interests. The effect of the section is not to authorize the taking of property without due process of law, as the Court of Appeals of New York held was the case with the statute referred to in the preamble to the questions submitted to us, and which in consequence thereof was declared by that court to be unconstitutional. *Ives v. South Buffalo Railway Co.*, 201 N. Y. 271, 1 N. C. C. A. (Negligence and Compensation Cases Annotated) 517, 94 N. E. 431, 34 L. R. A. (N. S.) 162. Construing the section as we do and as we think that it should be construed, it seems to us there is nothing in it which violates any rights secured by the State or Federal Constitutions. We see nothing unconstitutional in providing, as is done in part 1, § 2, that the provisions of § 1 shall not apply to domestic servants and farm laborers; nor in providing, as is done in part 1, § 5, that the employee shall be deemed to have waived his right of action at common law if he shall not have given notice to his employer as therein provided. The effect of the provisions referred to is to leave it at the employee's option whether he will or will not waive his right of action at common law. See *Foster v. Morse*, 132 Mass. 354, 42 Am. Rep. 438.

The rest of the Act deals mainly with a scheme for providing, through the instrumentality of a corporation established for that purpose, entitled the "Massachusetts Employees' Insurance Association," and the subscription of employers thereto for compensation to employees for personal injuries received by them in the course of their employment, and not due to serious and willful misconduct on their part. There is nothing in the Act which compels an employer to become a subscriber to the association, or which compels an employee to waive his right of action at common law and accept the compensation provided for in the Act. In this respect the Act differs wholly so far as the employer is concerned from the New York statute above referred to. By subscribing to the association an employer voluntarily agrees to be bound by the provisions of the Act. The same is true of

an employee who does not choose to stand upon his common law rights. An employer who does not subscribe to the association will no longer have the right in an action by his employee against him at common law to set up the defense of contributory negligence or assumption of the risk, or to show that the injury was caused by the negligence of a fellow servant. In the case of an employee who does not accept the compensation provided for by the Act and whose employer had become a subscriber to the association, an action no longer can be maintained for death under the Employer's Liability Act. But these considerations do not constitute legal compulsion or a deprivation of fundamental rights. We do not deem it necessary to take up and consider in detail the numerous provisions by which the right to compensation and the amount thereof and the persons entitled thereto and the course of procedure to be followed and matters relating thereto are to be settled and determined. We assume, however, that the meaning of §§ 4 and 7 of part III of the proposed Act is that the approved agreement or decision therein mentioned is to be enforced by proper proceedings in court, and not by process to be issued by the Industrial Accident Board itself. Taking into account the noncompulsory character of the proposed Act, we see nothing in any of these provisions which is not "in conformity with" the fourteenth amendment to the Federal Constitution, or which infringes upon any provision of our own Constitution in regard to the taking of property "without due process of law." It is within the power of the Legislature to provide that no agreement by an employee to waive his rights to compensation under the Act shall be valid. See *Missouri Pac. Ry. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 19 Am. Neg. Rep. 625, 26 Sup. Ct. 159, 50 L. Ed. 322.

In regard to the amendment it is to be observed that no liability insurance company is obliged to insure, and that if it chooses to do so there is nothing unconstitutional in requiring that it and the policy holder shall be governed by the provisions of the Act so far as applicable.

It should be noted perhaps in the interest of accuracy that there is no phrase in our Constitution which in terms requires that "property shall not be taken from a citizen without due process of law." The quoted words, which we take from the first question submitted to us, are a paraphrase of what is contained in the Constitution, but are not the language of the Constitution itself.

We have confined ourselves to the questions submitted to us, and we answer both of them in the affirmative,

Owing to their absence from the commonwealth, the CHIEF JUSTICE and Mr. Justice LORING have taken no part in the consideration of the questions.

JAMES M. MORTON.

JOHN W. HAMMOND.

HENRY K. BRALEY.

• HENRY N. SHELDON.

ARTHUR PRENTICE RUGG.

SMITH v. GENERAL MOTOR CAB COMPANY, LIMITED.

[HOUSE OF LORDS (ENGLISH APPEAL), APRIL 3, 1911.]

[1911] App. Cas. 188; 80 L. J. K. B. 839.

1. Appeal—Finding—Conflicting Evidence.

A finding on an issue of fact, based on conflicting evidence will not be disturbed on appeal.

2. Master and Servant—Workingmen's Compensation Act—Award—Bailee of Taxicab.

Evidence that a licensed driver operated a public taxicab, without control by the company owning the machine and that he received one-fourth of the proceeds for his services, justifies the finding that he was a bailee of the cab rather than a servant, and, therefore, he was not entitled to an award under the Workingmen's Compensation Act for an injury sustained by him while driving the cab.

Appeal from an order of the Court of Appeal, which affirmed the decision of Judge Woodfall of the Westminster County Court in an action brought to obtain an award for compensation under the Workmen's Compensation Act (6 Edw. 7, c. 58, §§ 1, 13) on the ground of being incapacitated by an accident which occurred in the course of the plaintiff's employment by defendant as a taxicab driver. Appeal dismissed.

[The decision of the Court of Appeal, July 11, 1910, is reported in 3 B. W. C. C. 500, under the title of Bates-Smith v. General Motor Cab. Co., Limited, under which title see decision of the House of Lords in 4 B. W. C. C. 249.]

For appellants—John O'Connor and Edmond Browne.

For respondents—C. A. Russell, K. C., and Gilbert Beyfus.

STATEMENT OF FACTS: The respondents were the owners of taxicabs which they let out to licensed drivers. These drivers plied for hire and paid for the cabs 75 per cent. of their takings. They compulsorily bought their ordinary supply of petrol from the respondent company, but on emergency were at liberty to purchase elsewhere. The drivers were compelled when driving to wear the livery cap which they purchased from the respondents, as well as leggings and breeches, and the respondent lent them coats and mackintoshes. There were a certain number of regular drivers—that is, men who applied every day for a cab. In addition there were a number of

"odd men"—that is, men who attended at a certain hour each day on the chance that the regular drivers might not have attended, in which case the cab was let out to them. The applicant was an "odd man." He stated that sometimes a week went by without his getting a cab. The drivers were entirely free and uncontrolled. They might apply for a cab if it suited them and might take it where they pleased. They might ply for hire diligently or the reverse, as it suited them. Notices were exhibited by the company; these were regulations for the efficient carrying on of the company's business, and compliance with them was the condition of the contract between the company and the drivers being entered into at all. The company enforced their regulations and got rid of an unprofitable or undesirable driver by refusing to let him have a cab. There was no contractual obligation on the company to let any particular driver have a cab, and there was no obligation on any driver to attend and apply for one. No wages were paid. No notice of termination on either side was given or was necessary. No control of the work was exercisable by the respondents.

The learned county court judge held that the appellant was a client of the company and a bailee of the cab, and that there was between the respondents and the appellant no contract of service, and dismissed the application; but, to avoid the necessity of a new trial in case of a successful appeal, held that the appellant, if he was a workman within the meaning of the Workmen's Compensation Act, 1906, was entitled to compensation at the rate of £1 per week from the date of the accident, and that he was still incapacitated from performing his duties as a taxicab driver as aforesaid.

[The foregoing statement of facts is from the report of the case in 80 L. J. K. B. 839. The decision of the county court judge is set out in (1911) App. Cas. 188.]

LORD ATKINSON. My Lords, this is a most hopeless appeal. It would appear to me to be founded on a disregard or forgetfulness of the fact that it is a well-established principle that the county court judge sitting as an arbitrator under the provisions of the Workmen's Compensation Act, 1906, is as absolute a judge of fact as a jury in a trial at Nisi Prius, if, indeed, not more absolute, and that his decision can only be reviewed by the superior courts on questions of law.

Whether there was any evidence before the arbitrator in any given case proper for his consideration and on which he could reasonably act to sustain his finding on an issue of fact is a question of law, and

his findings on such issues have often been set aside on the ground that there was an absence of such evidence, as was done in *Doggett v. Waterloo Taxicab Co.*, [1910] 2 K. B. 336, 79 L. J. K. B. 1085, 3 B. W. C. C. 371.

The point in controversy, on which the decision of this case turns, was what was the true nature of the relation between the respondents and the appellant. Was it that of master and servant, or bailor and bailee of the taxicab of the respondents of which the appellant was the driver?

It was not, it could not be, contended that all the terms of the contract entered into between the parties were embodied in a written document, the proper construction of which was a matter of law. Neither could it be contended that the respondents expressly admitted that the appellant was their servant, nor, as it would appear to me, that they admitted any fact or facts from which such a conclusion must necessarily be drawn as matter of law. On the contrary, the respondents at the hearing contended, rightly, in my opinion, that the wording of the document signed by the appellant ["I, the undersigned driver, hereby declare that I have taken the cab bearing the above numbers in good condition, with full kit of tools, tariff, and police plates properly affixed, and with my badge and license. I will be personally responsible for any violation of the police regulations"], the absence of all control over him once he had driven the cab out of the garage, and the casual nature of his employment, were all pieces of evidence which went to show that the relation between the parties was that of bailor and bailee, while the appellant on the other side as resolutely contended that the wearing of livery, the percentage of the earnings retained, the mode of accounting for the receipts, the deposits of his license, and the words "dismiss" and "discharge," used in certain notices, were all persuasive pieces of evidence to show that the true relation between the parties was that of master and servant.

The facts relied upon by the respondents were undoubtedly evidence of a bailment of the cab, upon which the county court judge could properly act; those relied upon by the appellant may have been evidence, strong evidence if you will, that the driver was the respondents' servant; but if so, the finding of the county court judge that the appellant was a bailee was a finding on conflicting evidence on an issue of fact. So that the appellant is driven to this position, that he must contend that, had the case been tried before a judge and jury, the judge would have been bound to direct the jury to find a

verdict for the plaintiff, on whom the burden of proof of service lay, a contention absolutely unsustainable.

It may be necessary to point out that the decision of your Lordships' House on this appeal does not in any way touch the question of the liability of the cab proprietor to third parties, passengers, wayfarers, or others, for the acts of the driver. It may well be that though the relation between the taxicab owner and his driver *inter se* be that of bailor and bailee, the driver may still *quoad* third parties be treated as the agent of the proprietor authorized to ply for hire in the streets for reward to the latter; and the proprietor be thereby rendered liable for those acts of the driver which were within the scope of the latter's authority. The general result of the cases of *Fowler v. Lock*, L. R. 7 C. P. 272 (1872), 41 L. J. C. P. 99; *Venables v. Smith*, 2 Q. B. D. 279 (1877), 46 L. J. Q. B. 470; *King v. London Improved Cab Co.*, 23 Q. B. D. 281 (1889), 58 L. J. Q. B. 456; *Smith v. Bailey*, 2 Q. B. 403 (1891), 60 L. J. Q. B. 779, and *Gates v. Bill & Son*, 2 K. B. 38 (1902), 71 L. J. K. B. 702, cited in *Doggett's Case* [*Doggett v. Waterloo Taxicab Co.*], 2 K. B. 336 (1910), 79 L. J. K. B. 1085, is that in the case of horse-drawn cabs, where drivers were given them in charge under terms resembling those admitted to exist in the present case, the relation between the proprietor and driver was that of bailor and bailee, but that *quoad* third parties the drivers were, under the provision of the Metropolitan Hackney Carriage Act, 1843 (admittedly applicable to taxicabs), deemed to be the servants of the proprietors.

The decision appealed from was, in my opinion, absolutely right. Kennedy, L. J., in his short judgment puts the case in a nut-shell ["I am of opinion that in this case we cannot possibly interfere with the finding of the learned county court judge. It seems to me that he did not misdirect himself in law, and that the findings of fact are certainly justified by the evidence as conclusions which he might draw from that evidence."]. I should like, if I may, to adopt that judgment as my own. I think that the appeal should be dismissed with costs.

LORD SHAW (of Dunfermline). My Lords, in this case I have only three propositions to state,—each in a sentence.

In my opinion, *quoad* the cab, the contract was an ordinary contract of *locatio rei*. *Quoad* the public, the relation of the cab-driver to the cab-owner was, in my opinion, one of agency; so that, for negligence in the conduct of his business, both principal and agent might naturally be responsible to the public. *Quoad* the employer himself, the question whether the relation of master and servant existed be-

tween the employer and the driver is one of fact. The fact has been found in this case that no such relation did exist. That point depends on many circumstances—the scope of the employment, the form of remuneration, the scope within which the person driving the cab has power to regulate his own times and seasons, or to drive or not to drive the cab as he wishes. These are familiar illustrations of the variety of things to be considered. I think that there was in this case ample evidence to confirm the finding of the county court judge. I concur in the course proposed.

EARL OF HALSBURY. My Lords, I agree.

LORD ASHBOURNE. My Lords, I concur.

LORD MERSEY. My Lords, I agree.

LORD LOREBURN, L. C. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs. [Lords' Journals, April 3, 1911.]

WILKE V. ILLINOIS CENTRAL RAILROAD CO.

[SUPREME COURT OF IOWA, DECEMBER 18, 1911.]

— Iowa, —, 183 N. W. 746.

1. Carriers—Live Stock—Exposure to Heat—Burden of Proof.

The burden of proving that the undue exposure of car loads of stock to heat, resulted from or was contributed to by the carrier's negligence, rests upon the shipper, if he accompanies the shipment in person or by agent.

2. Carriers—Injury to Live Stock—Exposure—Degree of Care.

The measure of care required of a carrier to avoid injury to stock in transit, from changes in temperature, is reasonable care and not the highest possible degree of care.

3. Appeal—Instructions—Prejudicial Error.

Erroneous instructions will be deemed to have been prejudicial where the jury reached a final agreement only after twenty-four hours delay, and when an additional instruction as to the desirability of their reaching a decision, if practicable, had been given to them.

Appeal by defendant from a judgment of the District Court of Hamilton County, rendered in favor of plaintiff, William Wilke, in an action brought to recover damages for loss of hogs due to heat while being transported by defendant. Reversed.

For appellant—Wesley Martin, and Kelleher & O'Connor.

For appellee—J. W. Lee, and D. C. Chase.

CASE NOTE.**Liability of Carrier for Injury to or Death of Live Stock Due to Heat.**

I. IN GENERAL, 581.

II. FAILURE TO WATER OR SHOWER HOGS, 583.

I. In General.

On the subject of the general duty of a carrier of live stock, Hutchinson on "The Law of Carriers," § 634, says: "It is the duty of the carrier of live stock, in the absence of special contract, and when they are not accompanied by the owner or some agent whose duty it becomes to provide for

them, to give them that attention which they require as living animals, and he cannot treat them as inanimate freight. They absolutely require ventilation and to be fed and watered; and if the carrier has not provided otherwise by contract with the owner when he accepts them for transportation, it becomes as obligatory upon him to care and provide for them in these respects, as their necessities may require, as to provide for them safe vehicles for transportation. If, for instance, a railroad company accepts hogs for transportation, which, from the crowded condition in which they are necessarily carried upon its cars, are liable to die

PETITION.

The plaintiff in his original petition alleges that on the 4th day of June, 1904, he delivered to the defendant two car loads of hogs for shipment to Chicago, Ill., one from Webster City, Ia., and one from Wilke, Ia., and that the defendant accepted and agreed to deliver said stock and undertook the shipment as aforesaid. That during the transit of said stock and at a place a short distance west of Cedar Falls, Iowa, defendant stopped its train carrying stock in a deep cut where the high banks of earth on either side of the train prevented any breeze from reaching said stock. That it was a very hot day, and that defendant wrongfully kept its train standing in said hot and suffocating cut for a long period of time and as a result of said exposure to heat twenty-seven of plaintiff's hogs died. That shortly after said train was stopped in said cut as aforesaid, plaintiff notified defendant that said stock was suffering from heat and requested defendant to move its train out of said cut to some place where the breeze could reach said stock and to take such steps as were necessary to prevent said stock from dying from suffocation, but that defendant neglected and refused to move said train or protect said stock or furnish any relief to said stock. That said injuries were without fault on plaintiff's part and due wholly to defendant's negligence, and plaintiff was damaged in the sum of \$371.31.

AMENDED PETITION.

When said cars in which defendant company carried said plaintiff's stock arrived at their destination, twenty-seven of the hogs were dead, and those not dead were in a bad condition and shrunk in weight, and that the death of said hogs and the great and unusual shrinkage referred to, occurred while said hogs were in defendant's care, and while they were being transported as aforesaid.

from overheating, it is the duty of the agents of the road to apply water to them externally when it is found necessary to prevent such overheating, and if they fail to do so, the company is liable."

A carrier will not be relieved from liability, if by the exercise of proper care, the effect of the weather conditions upon the stock could have been avoided. Thus, in *McCrary v. Missouri, K. & T. R. Co.*, 99 Mo. App. 518

(1903), a carrier was held liable for the loss of a number of hogs which were loaded by direction of the carrier's agent just prior to the scheduled arrival of the train, because of an unnecessary delay at certain points along the line, when the cars were left standing for several hours exposed to the heat, in consequence of which the hogs became overheated to a greater extent than if the delays had not occurred. The mere fact that the stock

That said hogs were alive and in good sound condition when delivered to defendant company for shipment.

ANSWER.

Defendant answered with a general denial except as to what is admitted. It admits that on or about the 4th day of June, 1905, it received for transportation from plaintiff certain hogs consigned for Chicago, but denies all negligence on its part.

McCLAIN, J. Plaintiff shipped two car loads of hogs over defendant's road, one from Webster City, and the other from Wilke, to Chicago, the two cars being contained in the same train; and, when the cars reached their destination, some of the hogs were found to have died, according to plaintiff's allegations, as the result of excessive heat. The specific charges of negligence on which plaintiff asked to recover damages for his loss were that during the transit, the days being very hot, the defendant left the train containing these two cars of hogs standing for several hours near Cedar Falls in a deep cut, where no breeze could reach them, and that notwithstanding notification from plaintiff that the animals were suffering from heat, and the request of plaintiff to defendant to move its train out of said cut to some place where the breeze could reach the animals so as to prevent injury to them from the excessive heat, defendant neglected and refused to move said train or to protect said stock or to furnish any relief for a long time thereafter, and that the injury resulting could have been prevented by the exercise of ordinary care on defendant's part, and was not due to any negligence or carelessness on the part of the plaintiff. The defendant denied the allegations of negligence. Plaintiff then amended his petition by alleging that plaintiff delivered to defendant the hogs referred to in good, sound, healthy condition, and that, when the cars containing the animals arrived at their des-

arrived in market on scheduled time was held not to relieve the carrier from liability for the damages sustained.

And in an action brought to recover damages for negligence and delay in transporting a number of beeves which were injured on account of heat and thirst, the court held that it was proper to refuse to give an instruction to the jury that "if any cattle were injured or had died from effects of being overheated on account of hot weather, then plaintiff could not re-

cover for such loss," since such charge would tend to eliminate from the consideration of the jury the condition of the weather in determining the question as to the want of care on the part of the carrier on the matter of facilities for watering the cattle. *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611 (1888).

II. Failure to Water or Shower Hogs.

A carrier which accepts for transportation live stock, such as hogs, which

tination, a certain number of the hogs were dead, and those not dead were greatly shrunk in weight, and were sick and in bad condition, and that the death and unusual shrinkage and sickness referred to occurred while the hogs were in defendant's care and being transported. To this amendment the defendant answered, denying the allegations, and alleging contributory negligence of plaintiff in loading and handling the animals while in charge of them during transportation, and that any loss occurring resulted from such contributory negligence, and from the sudden and unexpected rise in temperature and excessive heat. By way of reply the plaintiff denied the affirmative allegations in defendant's answer as amended.

During the introduction of the evidence, and in connection with the testimony of one Lloyd Bickford, who said that he accompanied the stock as the agent of plaintiff until the train reached Waterloo, which is east of Cedar Falls on defendant's line of road, where he got off the train in which the hogs were being transported to eat dinner, and there missed the train on which the hogs were carried from Waterloo to Chicago, taking another train for that destination. The contract of shipment between plaintiff and defendant, signed also by the witness as the person in charge of and accompanying the stock, was offered in evidence, describing the car of hogs shipped from Webster City; and another contract in the same form, but signed by another person as the person accompanying the hogs, relating to the car load shipped from Wilke, was also introduced. In these contracts it was provided that the cars were to be in charge of the shipper or his agents while in transit, that he assumed the duty of loading and unloading, and that the defendant company would not be liable for any loss or damage to the stock caused by heat or suffocation or for any loss or damage, however caused, not resulting from gross negligence of defendant, and further, that the shipper would at all times take care of

is liable to be injured in consequence of overheating, must shower the animals when necessary, and in case of its failure to do so, it must respond in damages. Ill. Cent. R. Co. v. Adams, 42 Ill. 474, 92 Am. Dec. 85 (1867); Toledo, W. & W. R. Co. v. Thompson, 71 Ill. 434 (1874); Toledo, W. & W. R. Co. v. Hamilton, 76 Ill. 393 (1875); Wallace v. Lake Shore & M. S. R. Co., 133 Mich. 633, 95 N. W. 750 (1903); Lake Shore & M. S. R. Co. v. Gibson, 28 Ohio C. C. 538 (1904).

The carrier will not be relieved of liability because the shipper overcrowded the car in loading the same, or because the carrier was not accustomed to shower animals en route unless ordered to do so by the shipper. Lake Shore & M. S. R. Co. v. Gibson, *supra*. And the scarcity of water will not excuse the carrier from the performance of its duty, where it failed to notify the shipper of such scarcity. Toledo, W. & W. R. Co. v. Thompson, *supra*.

In Peck v. Chicago, G. W. R. Co., 138

the stock at his own expense and risk, free transportation being given to the shipper or his *bona fide* employee in charge of the stock for that purpose. At the conclusion of the evidence, defendant offered an amendment to its answer to conform the pleadings to the evidence, alleging that the shipment was made under the two contracts above referred to, by the terms of which plaintiff agreed to take care of the stock and give it the necessary care and attention while the train was not in motion, and that he or his authorized employee would accompany the train for that purpose; and that, by reason of such contract, plaintiff could not recover on account of failure of defendant to water and care for the stock or on account of any of the other matters referred to in the contract as those which plaintiff agreed to perform. The court refused to permit the filing of this amendment on the ground that the defendant must have had as much knowledge as the plaintiff in regard to the existence of these contracts at the commencement of the suit, and that the court had made rulings on the introduction of evidence under the pleading as they existed which would have been erroneous if the contracts had been pleaded before the evidence was introduced.

The principal complaint on behalf of appellant is as to the giving of instructions in which it was assumed that the amendment to plaintiff's petition alleging that the hogs were alive and in good, sound, healthy condition when delivered to defendant for shipment, and that, when they arrived at their destination, some of them were dead, and the others greatly shrunk in weight and sick and in bad condition, such loss and damages occurring while the hogs were in defendant's care during transportation, stated an independent cause of action, with reference to which the jurors were instructed that proof of the fact

Iowa, 187, 115 N. W. 1113, 16 L. E. A. (N. S.) 883 (1908), it was held that a carrier which received hogs for transportation during hot weather, upon being notified by the shipper that the hogs will require showering en route to keep them in proper condition and avoid shrinkage, is liable for the loss of hogs caused by overheating, due to its failure to shower the animals.

It was held in *Lachner Bros. v. Adams Express Co.*, 72 Mo. App. 13 (1897), to be a question for the jury whether the carrier's failure to supply necessary air and water to a hog ship-

ped in a crate, was the cause of its death, where the evidence showed that the crate was properly constructed with a water-tight bottom, that three gallons of water had been placed therein for the animal, that the crate was delivered to the carrier on a hot day to be transported to a point about three hours distant, that shortly after the train had started the water placed in the crate had escaped therefrom, and that the express messenger failed to replace the same, although his attention was called thereto.

It is the duty of a carrier to provide

alleged by a preponderance of the evidence would require a verdict in favor of plaintiff unless the jury should "find that the defendant has established by a preponderance of the evidence its second defense in which event your verdict should be in favor of the defendant;" the second defense being that the plaintiff was in charge of the stock during shipment, and that any loss occurring during said shipment by reason of sudden rise in temperature and excessive heat was chargeable to plaintiff, and, further, that such loss was due to the contributory negligence of plaintiff, and not to the negligence of the defendant. And, in this connection, the court further charged that the verdict should be in favor of the defendant if it had been shown by a preponderance of the evidence that with respect to the stock defendant "exercised the highest possible degree of foresight, pains, and care reasonably to be expected of it." In another instruction the jurors were told that, if plaintiff had proved that the stock "was in good condition when delivered to the carrier, but was in bad condition when it arrived at destination, the burden of proof is on the carrier to show by a preponderance of the evidence, in order to avoid liability, that it exercised with respect to said stock the highest possible degree of foresight, pains, and care, reasonably to be expected of it."

In the case of *Colsch v. Chicago, M. & St. P. R. Co.*, 149 Iowa, 176, 127 N. W. 198, finally decided in this court after the trial of the present action in the lower court, it was held that for injuries resulting to live stock during transportation by reason of changes in temperature the common carrier is not liable as an insurer but only for negligence; and that, if the owner or his agent accompanies the stock, the burden is on him to show that negligence of defendant occasioned the injury, and that in such cases no presumption of negligence arises merely from proof of the fact of loss or damage, the shipper in charge

the shipper with water, where the shipper accompanies the stock and agrees to feed and water the same at his own risk; and in case of the failure of the carrier to supply water at suitable points along the route, in consequence of which certain hogs died, the carrier is liable. *Wabash, St. L. & P. R. Co. v. Pratt*, 15 Ill. App. 177 (1884).

A recovery for the loss of a car load of hogs was denied in *Peterson v. Chicago, M. & St. P. R. Co.*, 19 S. D. 122 (1905), on the ground that the evidence was insufficient to show that

the carrier's employees negligently failed to "wet down" the hogs, or that such failure was the proximate cause of the injury. "In the absence of evidence to the contrary," said the court, "it should be assumed that the defendant's employees did their duty—that they watered the hogs as often as the circumstances required."

Under a contract for the shipment of a lot of hogs, containing a stipulation, in consideration of a reduced rate of freight, whereby the plaintiffs assumed the risk of injury from heating, it was

of the stock during the transit being presumed to know the cause of such loss or damage as well as the carrier. On the other hand, the rule is recognized in that case that, if the shipper or his agent does not accompany the stock in charge of it, the burden rests upon the carrier, which alone is presumed under such circumstances to have knowledge of the fact to prove by a preponderance of the evidence that the loss or damage did not result from any cause attributable to defendant's negligence. The reasons for these rules are fully stated in that opinion, and need not be elaborated here. See *Mosteller v. Iowa Central R. Co.*, (Iowa) 133 N. W. 748, decided at present term. In view of these rules, we have no difficulty in reaching the conclusion that the instructions above referred to were erroneous to defendant's prejudice.

In the first place, it appears beyond question that the agent of the plaintiff did accompany the stock during at least a portion of the transportation for the purpose of caring for it, and that the only undue exposure to heat which the evidence tended to establish occurred during the time when the stock was accompanied by and in charge of defendant's said agent. To this extent at least the burden was on the plaintiff to show by a preponderance of the evidence that such exposure was the result of, or was contributed to by, defendant's negligence without the fault or neglect of the agent of plaintiff.

In the second place, the instructions would have been erroneous even in the absence of any evidence that plaintiff or his agent accompanied the stock in requiring defendant to show by a preponderance of the evidence that with respect to the stock defendant exercised the highest possible degree of foresight, pains, and care reasonably to be expected of it. The measure of care required of the carrier to avoid injury to the stock in transport from changes in temperature is reasonable care, and not the highest possible degree of care. *Colsch v. Chicago, M. & St. P. R. Co.*, 149 Iowa, 176, 127 N. W. 198.

The trial court did not in any of its instructions refer specifically to the fact that plaintiff's agent accompanied the stock as having any bearing on the sufficiency of the evidence as to defendant's negligence. Something was said with reference to the burden of proof resting on plaintiff, under the issue raised by its original petition and the answer thereto relating to the specific negligence charged in stopping the

held in *Cragin v. N. Y. C. R. R. Co.*, 51 N. Y. 61, 10 Am. Rep. 559 (1872), that the carrier was not liable for the loss of a number of the hogs from the

effects of heat, due to the negligence of the carrier's employees in failing to water and cool the hogs by wetting.

train on a very hot day in a deep cut, and keeping the stock in that situation for a long period of time, resulting as alleged in loss of and damages to plaintiff's hogs, to show by a preponderance of the evidence that plaintiff was himself free from any negligence contributing to such injury; but this did not give to the defendant the full benefit to which it was entitled under the issue raised under the amendment to the petition of the fact that plaintiff's agent did accompany the stock during the period of this specifically alleged negligent conduct of the defendant. The court seems to have assumed that without the amendment to its answer offered by the defendant at the conclusion of the evidence, which the court refused to entertain, relating to the contract of shipment, there was nothing in the case to render the fact that plaintiff's agent accompanied the stock in any way material. As will appear from an examination of the opinion in the Colsch case, *supra*, it is evident that the fact was material not as affecting the degree of care, but as affecting the burden with reference to proof of defendant's negligence, and that for this purpose it is the fact rather than the specific contract which is controlling. If, in fact, the shipper or his agent, with the carrier's assent, accompanies the stock during transportation for the purpose of caring for it so far as practicable, then the shipper is in as good a position as the carrier to know what was the cause of the loss or injury, and whether such loss or injury was the result of the carrier's negligence, and the burden of proving the carrier's negligence therefore remains in the nature of things with the plaintiff to show that as to matters reasonably within his knowledge while accompanying the stock the fault occasioning the injury was not his but that of the carrier. *Grieve v. Ill. Cent. R. Co.*, 104 Iowa, 659, 74 N. W. 192; *Terre Haute & Ind. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239, and note; *St. Louis & S. F. R. Co. v. Wells*, 81 Ark. 469, 99 S. W. 534; *Libby v. St. Louis, I. M. & S. R. Co.*, 137 Mo. App. 276, 117 S. W. 659; *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166, 20 Am. Neg. Rep. 616, 108 N. W. 982, 124 Am. St. Rep. 837, 15 Am. & Eng. Ann. Cas. 33, and note.

It appears from the record that the jurors were unable to agree for more than 24 hours after the case was submitted to them, and only reached a final agreement after the court had given an additional instruction as to the desirability of reaching a decision if practicable by giving proper regard and deference each to the opinion of the others. No complaint is made of this instruction, but the fact that the court found it necessary to give such an instruction indicates that errors of the court in the instruction given with reference to the burden of proof and the highest possible degree of care, may have had a very

material bearing upon the action of the jury. We cannot avoid the conclusion, therefore, that the errors pointed out may have been so far prejudicial as to require the reversal of the judgment.

Other alleged errors in the trial of the case are relied on for appellant, but, if the case is retired in accordance with the rules indicated in this opinion to be applicable to it, the errors complained of, if indeed in these other respects errors were committed, are not likely to recur and further discussion would be of no advantage.

The judgment must be reversed.

HENDRICKSON v. SWENSON.

[SUPREME COURT OF SOUTH DAKOTA, NOVEMBER 14, 1911.]

— S. D. —, 133 N. W. 250.

1. Negligence—Highways—Contributory Negligence.

One who, while driving a spirited team of colts down a hill on a dark night, lays down the lines to search in the wagon box for his mittens, and is thrown out when the wheel strikes a large stone set at a turn of the road to protect the corner post, is guilty of such negligence as will preclude recovery of damages from the person who placed the stone in the road.

2. Negligence—Proximate Cause—Personal Injuries.

The act of a landowner in placing a large stone at a turn of a road to protect the corner post was not the proximate cause of injuries sustained by the driver of a spirited team of colts who was thrown from his wagon when a wheel struck the stone on a dark night while he was searching in the wagon box for his mittens, without keeping the lines in his hands.

3. Trial—Directing Verdict—Negligence.

A verdict should be directed for the defendant in an action based upon negligence, where, on the admitted facts, fair-minded men would agree that the plaintiff failed to exercise ordinary care under the circumstances.

Appeal by plaintiff from a judgment of the Circuit Court of Day County, directed in favor of defendant in an action brought to recover damages for personal injuries and for the destruction of a buggy caused by striking a stone placed by defendant on the side of a highway to protect the corner post. Affirmed.

For appellant—Sears & Potter.

For respondent—Anderson & Waddell.

COMPLAINT.

As his cause of action herein plaintiff states:

That prior to the 6th day of May, 1910, the defendant wrongfully and in violation of law, placed in the public highway, between Sections 1 and 2 in the Township of Webster, Day County, S. D., a certain obstruction, to wit: A large rock or stone about three feet by two and one-half feet in size, and about three feet in thickness.

NOTE.

On the subject of Liability for Injuries Caused by Horses Taking Fright

at Noises and Various Objects on the Highway, see notes in 14 Am. Neg. Rep. 651 and 21 Am. Neg. Rep. 445.

That the said defendant placed said stone in the highway with the intent to obstruct public travel, and the same was an obstruction and was dangerous to passing teams.

That at the point where said obstruction was placed in said highway, the public travel was considerable and continuous.

That on the 6th day of May, 1910, this plaintiff was driving along said public highway with a team and buggy or light wagon, the team being a young and spirited team, and it being evening and dark, and the said stone being placed at the foot of the hill down which the road ran, the plaintiff, although exercising due care, ran onto said stone, his horses at that time going at a rapid rate, and by the contact with said stone plaintiff was thrown from his buggy onto the ground, and his face and head cut and severely injured. That the said buggy was broken and rendered useless, and his team of horses broke loose therefrom and escaped from plaintiff.

That the plaintiff was caused great suffering, pain and inconvenience by reason of the said injury, and his property was damaged thereby, both his horses and his wagon, and by reason of the said wrongful act of the defendant in placing said stone in said highway, plaintiff has been damaged in the sum of One Thousand Dollars (\$1,000); for which sum he asks judgment, together with his costs and disbursements of this action.

ANSWER.

Comes now the above named defendant and for his answer to plaintiff's complaint respectfully states:

I. Defendant denies each and every allegation, matter, fact and thing in said complaint contained and the whole thereof.

II. Defendant specifically denies that plaintiff was ever injured by reason of any act or omission on the part of defendant, and further denies that plaintiff has been damaged in the sum of \$1,000, or in any other sum whatsoever.

Wherefore, defendant prays judgment that plaintiff's complaint be dismissed upon the merits, and that he have and recover his costs and disbursements herein.

CORSON, J. This is an appeal by the plaintiff from a directed judgment in favor of the defendant. The action was instituted by the plaintiff to recover damages alleged to have been sustained by him for personal injuries and partial destruction of his buggy. [Here the court sets out the complaint in manner and form as quoted *supra*.] The defendant denied generally and specifically, each of the allegations of the complaint.

At the close of all the evidence; the defendant moved the court to direct a verdict in his favor, for the reason that the evidence fails to show that the plaintiff has been damaged, or that the damage was caused by any act on the part of the defendant. This motion was granted by the court, and the jury directed to return a verdict in favor of the defendant. The verdict being directed, a review of the evidence becomes necessary, as the only question presented by the record is, Was the court justified under the evidence in so directing a verdict in favor of the defendant?

Mr. Alley, being called as a witness on behalf of the plaintiff, testified in substance: That he was a surveyor; that he was familiar with sections 1 and 2 of Webster township, Day county; that he made measurements of the section line between sections 1 and 2 in that township; that there was a large stone near the corner of the fence; that the stone was of the size mentioned in the complaint, and that at its highest point was about twenty inches above the ground; that the stone was located $25\frac{1}{2}$ feet from the center of the road, and was $7\frac{1}{2}$ feet inside of the 33-foot limit east of the center line; that south of the stone there was a hill of about 25 or 30 degrees slope, and extending about 100 feet; that just at the point in the highway near the stone there was a turn-off to the east, and just a little further north there was a marsh, and the road turned to the east to avoid the marsh. On cross-examination, he testified in substance that the road at the point near where the stone was turns to the east, and the section line goes straight to the north.

The defendant, being called as a witness for the plaintiff, testified in substance: That he was the owner of the fence at the corner where the stone described by Alley lay; that he built the fence and placed the stone there to protect the corner post.

The plaintiff, as a witness on his own behalf, testified in substance: That he lived 15 miles north of Webster; that he did his trading at that place, and traveled over the road testified to; that he traveled over that road about the 6th of May, 1910; that he was in Webster that day, and left for home about half past ten in the evening; that he had a pair of colts, about three or four years old, hitched to the buggy; that on the way home that night he struck the stone Mr. Alley testified to at the foot of the hill; that it was lying right out from the corner post; and when he came down the road he had to turn east, and the buggy wheel happened to strike the stone, and he was thrown out and rendered unconscious for a time; that when he woke up his team had gone away with the neckyoke and whiffletrees; that the buggy was badly damaged; and that he was injured about the face

and body. And he describes the manner in which the accident occurred as follows: "I was driving these horses the same way I had always driven them. It was pretty dark, and I was driving without mittens, and just when I was on top of the hill I went down in my buggy box to get my mittens, and I got hold of one and tried to get that on, and tried to get the other one, and the horses turned before I got the lines; they started to go down hill. They turned where that rock is for the corner post. I did not see the stone before the buggy wheel was on it. I had the lines in my hands at the time." On cross-examination he testified as follows: "I left town about half past ten. * * * I drove a pair of colts that night. These colts were pretty lively. I had not driven them very often to town. They were pretty spirited. They never ran away before this; this was the first time. I came down this hill, and was fumbling around for my mittens. This hill is $4\frac{1}{2}$ miles from Webster. It was cloudy and pretty dark. I had not worn my mittens since starting from Webster. I had no trouble with the team. I had the lines down at the bottom to get the mittens. They started up, and I had the lines in my hand. They started to run down the hill—just trotting—a common-times trot. I cannot tell exactly how it happened. I was looking down in the buggy box; I couldn't look down in the buggy box and watch the team at the same time. I had traveled this road quite often before. * * * I had been in the habit of turning around this corner and driving down across Swenson's land before he fenced it; also after the fence was there. I took that angling road to avoid the slough on the section line to the north, and this stone was just at the point where you turned off the section. I had seen it there quite often before."

Dr. Schenecker, a witness sworn on behalf of the plaintiff, testified as to the injuries the plaintiff received; that he dressed the wounds, and about two or three weeks after this he dressed them again.

The defendant testified as a witness on his own behalf, but his evidence was not material, and is therefore omitted.

It is contended by the respondent in support of the ruling made by the court, directing a verdict, that it clearly appears from the evidence that the injuries of the plaintiff and his buggy were caused by his own contributory negligence, and that that was the proximate cause of the injury. It is contended, however, by the appellant that as to whether or not the injury was caused by the contributory negligence of the plaintiff was a question for the jury, and that under the facts proven the court was not justified in directing a verdict for the defendant.

Section 1663, P. C. provides that: "If any person shall willfully,

carelessly or negligently obstruct or injure any public highway, public street or bridge, it shall be the duty of the road supervisor of the district in which such obstruction is placed or injury done to enter complaint in behalf of the people against the person or persons offending * * *."

Section 1747, P. C. provides: "Whoever at any time obstructs any of the public highways in this State in any manner with intent to prevent the free use thereof by the public, * * * shall be subject to a fine of not less than five nor more than twenty-five dollars * * *."

The placing by the defendant of this stone extending into the highway was clearly a dangerous obstruction to the travel thereon by the public, and, had the plaintiff used ordinary care in the management of his team, he would undoubtedly have the right to recover from the defendant such damages as he sustained by reason of the injury. But, notwithstanding the negligence of the defendant, if the plaintiff was guilty of contributory negligence which contributed to his injury, he would not be entitled to recover. "Reason and justice demand that two conditions should exist, namely, fault on the part of the party charged with causing the injury, and freedom from contributory fault on the part of the injured." *McKeever v. Homestake Mining Co.*, 10 S. D. 599, 74 N. W. 1053. And: "Where the evidence is such that different minds may reasonably draw different conclusions as to contributory negligence, the question is for the jury. But, where the court can say from the evidence that ordinarily intelligent, reasonable, and fair-minded men would not and ought not to believe that the plaintiff was acting as an ordinarily prudent person would have acted under the circumstances, the question of plaintiff's negligence is for the court." 29 Cyc. 631. And in the late case of *Hewes v. Chicago & E. I. R. R. Co.*, 217 Ill. 500, 19 Am. Neg. Rep. 153, 75 N. E. 515, the learned Supreme Court of Illinois, in discussing the law applicable to this class of cases, says: "The general rule is that negligence and contributory negligence are questions of fact for the jury, but when the facts are admitted, and all reasonable minds will agree that the injury was the result of the plaintiff's own negligence, the court may, as a matter of law, find that there was such contributory negligence on the part of the plaintiff as to defeat a recovery, and so inform the jury by a peremptory instruction. *Werk v. Ill. Steel Co.*, 154 Ill. 427 (14 Am. Neg. Cas. 272, 40 N. E. 442); *Chicago & Northwestern R. Co. v. Hansen*, 166 Ill. 623 (2 Am. Neg. Rep. 321, 46 N. E. 1071); *Beidler v. Branshaw*, 200 Ill. 425 (13 Am. Neg. Rep. 262, 65 N. E. 1086)." And the law was so held by this court in the case of *Bohl v. City of*

Dell Rapids, 15 S. D. 619, 12 Am. Neg. Rep. 94, 91 N. W. 315, and seems to be sustained by the great weight of authority.

It would seem from the testimony of the plaintiff, giving him the benefit of every inference that might be drawn in his favor, that he failed to observe ordinary care while driving down the hill to the corner where the stone was placed by the defendant. It will be noticed that he says: "It was pretty dark, and I was driving without mittens, and just as I was on top of the hill I went down in buggy box to get my mittens, and I got hold of one of them and tried to get that on, and tried to get the other one, and the horses turned before I got the lines; they started to go down the hill. They turned where that rock is for that corner post. I did not see the stone before the buggy wheel was on it. I had the lines in my hand at that time." It will be observed that on cross-examination plaintiff further states that he was driving a pair of colts that were pretty spirited, and he says, "I came down this hill, and was fumbling around for my mittens," and that he had the lines down at the bottom to get the mittens; that the team started to run down the hill; that he could not tell exactly how it happened; that he was looking down in the buggy box; and that he could not look down in the buggy box and watch the team at the same time.

We are of the opinion that all reasonable and fair-minded men would arrive at the conclusion from this evidence that the plaintiff failed to exercise the ordinary care that fairly prudent men would have observed in driving a spirited team of colts on a dark night, in going down the hill to the corner around which he was to turn in making his trip homeward. The plaintiff failed to act with the ordinary care and prudence that an ordinary man would have used, even in driving an old and well-broken team, in going down the hill over which the plaintiff passed. And, taking into consideration the fact that he was driving a young and spirited team of colts, which the plaintiff says had not been driven much, the conclusion is irresistible that the conduct of the plaintiff contributed very greatly, if not solely, to the injury he received.

It is contended by the appellant that the fact that the driver of a team, under such circumstances, lays down the lines "for a moment to clothe his hands with his mittens, in order to protect himself from the cold, is not a negligent act," and, "giving the evidence on this point the strongest possible inference favorable to defendant, it cannot be said that this act was a contributory cause to the injury. It merely produced a condition of things through which the defendant's act operated to produce the injury complained of. In such case, the

authorities all hold that the defendant is still liable,"—citing 21 Am. & Enc. of Law, 494, in which the learned author of the note on Negligence says: "In the consideration of negligence as the proximate cause of injuries, the distinction between conditions and causes should be borne in mind. Where an alleged intervening cause upon which a defendant relies for his exoneration is in reality only a condition upon or through which the negligent act operated to produce the injuries complained of, the defendant will be held liable. So, if the defendant's act or omission supplied the conditions by which a subsequent act or cause, the occurrence of which might have been expected, was rendered dangerous and hurtful, the defendant is responsible. But, if, on the other hand, the defendant's act or omission was not a cause of the injuries, but was only a condition upon which some new, independent, and unforeseen cause operated, the latter is the proximate cause of the injuries, and the defendant's negligence is too remote."

The appellant further contends that, even if the defendant's contention that the acts of the plaintiff may have contributed to his injury were correct, yet whether they did or not was a question for the jury, and the court had no right to refuse to submit it, and cited the case of *Snee v. Telephone Co.*, 24 S. D. 361, 123 N. W. 730. But we are unable to agree with the appellant in this contention. In the case cited, the trial court refused to grant a motion to direct a verdict in favor of the defendant, and its ruling denying the motion was affirmed by this court; but it will be observed from the facts as stated in the opinion in the case that the evidence of contributory negligence on the part of the plaintiff was not such that all persons would agree that the act of the plaintiff in passing over the telephone wires under the circumstances was negligence on her part, and in view of the evidence in that case the decision of this court was clearly correct in following the general rule that the questions of negligence or contributory negligence are ordinarily matters for determination by the jury.

We are of the opinion, however, that the rule as above stated has no application to the case at bar. While it may be conceded that the defendant's act in placing the stone in the highway was a wrongful act, and that it would have ordinarily rendered him liable for the damages resulting to the plaintiff, had the plaintiff observed ordinary care in traveling along the highway, yet the negligence of the plaintiff, as shown by his testimony, was such as clearly to preclude him from recovering in this action. If, as contended by the appellant, the plaintiff, under the circumstances, in laying down his lines at the top of the hill, considering the nature of the team he was driving, and

fumbling about his buggy box to get his mittens, exercised such ordinary care that different persons might conclude that he was not guilty of contributory negligence, of course the court was in error in directing a verdict. But it seems to us that fair-minded men would not differ that there was the want of ordinary care exercised by the plaintiff under the circumstances, and that all would agree that such conduct on the part of the plaintiff was not such as an ordinarily prudent man would have used under the same circumstances.

We are therefore of the opinion that the court was right in directing a verdict in favor of the defendant, and that the judgment of the court in directing the verdict and denying a new trial should be and are affirmed.

JEFFERSON v. CITY OF SALT STE. MARIE.

[SUPREME COURT OF MICHIGAN, MARCH 31, 1911.]

166 Mich. 340.

1. Municipal Corporations—Sidewalks—Snow.

It is a fact of common knowledge that a snowplow used in clearing snow from city streets does not, and cannot clear the snow in the center of the walk as well as it does at the edges, where pedestrians have not trodden.

2. Municipal Corporations—Icy Walk—Pedestrian—Care.

The danger of falls on slippery places on the sidewalks of a city is one against which a pedestrian must ordinarily protect himself, because a city is under no obligation to remove either ice or snow.

3. Municipal Corporations—Sidewalks—Ice and Snow.

A city not being obliged to remove snow and ice from its streets, cannot be held liable to a pedestrian who was injured by slipping on an icy sidewalk thereby breaking her leg, because of a ridge of snow and ice left in the middle of the walk by a snowplow used by the city in clearing its sidewalks, due to the fact that the snow in the center of the walk had been trodden down by people more than at the edges.

Appeal by defendant from a judgment of the Circuit Court of Chippewa County, rendered in favor of plaintiff in an action brought to recover damages for personal injuries caused by slipping upon an icy sidewalk. Reversed.

For appellant—Sherman T. Handy.

For appellee—John W. Shine.

DECLARATION.

Helen Jefferson, plaintiff herein, by John W. Shine, her attorney, complains of the City of Sault Ste. Marie, a municipal corporation of said county, defendant herein, in a plea of trespass on the case, the defendant having been duly summoned herein by writ of summons.

For that whereas the defendant, at the time of the committing of the grievances hereinafter set forth, was and still is a municipal corporation organized pursuant to the laws of the state of Michigan; and that, as such municipal corporation, it had jurisdiction and authority

NOTE.

On the subject of Liability of Municipal Corporations for Personal Injuries

Caused by Snow and Ice, see note in 20 Am. Neg. Rep. 369.

over a certain street known as Spruce street within said City of Sault Ste. Marie, which street at the time of the breach of duty and injury hereinafter referred to was open to public travel and under the care and control of said defendant, and has been in use as such street by the public for a period of, to-wit, fifteen years and upwards at the time of said injury, and which had been laid out and dedicated as a public street for public use and was accepted, worked and used by the public as a street for fifteen years and upwards prior to the injury complained of. That at the time of the injury complained of and for some time prior thereto, there was a cement concrete sidewalk on both sides of said street leading easterly from Ashmun street, each walk being to-wit, twelve feet in width. That the walk on the south side of said Spruce street adjacent to Ashmun street and easterly therefrom extended up to the south line of said Spruce street, or what is known as the property line. And plaintiff avers that it was the duty of the defendant to keep said Spruce street and said sidewalk and particularly the sidewalk on the south side of said street from Ashmun street easterly in condition reasonably safe and fit for travel so that the plaintiff and others might walk over and along said sidewalk on the south side of said street easterly from Ashmun street in safety while in the exercise of due care; and it became and was the further duty of the defendant after knowledge by and notice to the defendant that said sidewalk had become in an unsafe condition to put the same in proper condition for use within a reasonable time after such knowledge or notice.

And plaintiff further avers that on, to-wit, the 10th day of February, 1909, and for, to-wit, one year and upwards prior thereto, there had been erected at the southeast corner of Ashmun street and Spruce street a certain store building, the north walls of which were close up to the sidewalk on the south side of said Spruce street, while the west wall of said building was adjacent to the sidewalk on the east side of Ashmun street, and that on the said 10th day of February, 1909, and for one year and upwards prior thereto there was and had been a certain eave or projection extending along the north side of said building, to-wit, twelve feet above said sidewalk and projecting out, to-wit, two feet from said building and over said sidewalk, the said projection not being the regular eave of said building but one attached to the side of said building, but for what purpose is unknown to said plaintiff. And the plaintiff further avers that on the said 10th day of February, 1909, and for, to-wit, ten days prior thereto at a point on said sidewalk on the south side of the said Spruce street, and, to-wit, ten feet easterly from the east line of Ashmun street, said sidewalk

had become in an unsafe, improper and dangerous condition for travel, to-wit, snow and ice had accumulated and formed a sharp ridge extending lengthwise along said walk and, to-wit, four or five feet out from the wall of said building with a sharp slope on both sides from the point of said ridge, and particularly on the south side, which ridge of ice and snow was caused by the dripping from said projecting eaves of said building, and freezing, and by the defendant in the use of its snow plow over and along said sidewalk, cutting away the loose snow from the hard center of said ridge, leaving the ridge more prominent, and the slopes to the side of said ridge more steep.

And the plaintiff avers that it was the duty of the defendant to keep said sidewalk in a condition reasonably safe and fit for travel and to remove said projecting eave from overhanging said sidewalk and to prevent the drippings from said eave from forming a ridge of ice and snow on said sidewalk. And it also then and there became and was the duty of the defendant in running its snow plows over said sidewalk to cause said ridge of ice and snow to be cut down level and not to leave the same projecting up and dangerous to public travel. And the plaintiff avers that the said defendant disregarded its said duty in that respect and failed and neglected to remove said projecting eave and prevent the accumulation of such ridge of snow and ice and failed and neglected to level down the ridge of ice and snow on said sidewalk in a condition reasonably safe and fit for travel, and the said plaintiff avers it had reasonable time and opportunity after such knowledge and notice to put said sidewalk in proper condition for use and travel, but that the defendant disregarded its said duty and negligently and wrongfully failed and omitted to remove said eave and prevent the accumulation of snow and ice in a ridge on said sidewalk, and to put said sidewalk in proper condition for use and travel after such knowledge and notice.

Plaintiff further avers that thereafter and on, to-wit, the 10th day of February, 1909, while the defendant was in default as aforesaid in the pursuance of its said duty, and while the plaintiff, in the exercise of due care and caution and without fault on her part, was walking easterly along said sidewalk from Ashmun street at about three o'clock in the afternoon, and when at a point about ten feet easterly from the east line of Ashmun street going easterly in stepping slightly to the right to pass two ladies she met at that point, she stepped on the side or slope of said ridge, being the side of said ridge toward the said building, and in stepping on the side or slope of said ridge, her feet slipped out from under her, causing her to fall heavily towards the street and across the ridge of ice and snow on her left side, by

reason whereof the plaintiff then and there became and was greatly hurt, cut, bruised and wounded in and about her left leg, hip and side, her left leg being broken near the hip joint, and was confined to her bed for a long time thereafter, to-wit, four months, and became and was sick, sore, lame, disordered and so remained and continued for a long space of time, to-wit, six months then following, during all of which time plaintiff was deprived of social enjoyment with her friends, and suffered great bodily pain and mental distress, and was obliged to undergo medical treatment. And for a space of, to-wit, six months next thereafter and up to the time of the commencement of this suit, the plaintiff was and has been thereby hindered and prevented from performing and transacting her usual and customary business and occupation as wife and mother. And by reason of the premises also the plaintiff was put to great expense, cost, and charges in the whole amounting to a large sum, to-wit, two hundred dollars, in procuring medicine and medical attendance, nursing, treatment and care in and about endeavoring to be cured of her said wounds, sickness, lameness and disorder so occasioned as aforesaid.

And the plaintiff further avers that by reason of said negligent act of the defendant she, the plaintiff, has been permanently injured and will suffer in the future great bodily pain and great inconvenience and annoyance in the following particulars: That owing to the injury to her left hip she will be unable to have the free use of her said leg and hip, and that said leg by reason of the fracture is shorter, and is, has been and will be stiff and sore, and she will be deprived of the free use and exercise thereof.

And the plaintiff further avers that on, to-wit, the 6th day of March, 1909, she gave written notice of said injuries to the common council of said city, giving the particulars and date thereof, and that the same was afterwards and on, to-wit, the 8th day of March, 1909, taken up and acted on by said council and the same was then and there referred to the city attorney, a true and correct copy of which said notice is hereunto annexed and made part of this declaration and marked Exhibit "A."

And the plaintiff further avers that afterwards and on, to-wit, April 3, 1909, she presented to the comptroller of said city a statement in writing and under oath stating therein the time, place, cause and manner of her said injuries, and the facts connected therewith, and the name of the persons present when such injury was received so far as she knew, and the amount of damages claimed by reason thereof, a true and correct copy of which said claim so presented is hereunto annexed and marked Exhibit "B," and made part hereof.

And plaintiff avers that on, to-wit, the 5th day of April, 1909, the comptroller of said city presented the same to the council of the city for their action thereon, and that on, to-wit, April 5th, 1909, the said council took up and acted on said claim and referred said claim to the city attorney for his opinion as to the liability of the city thereon.

And plaintiff further avers that although she has often requested the said city attorney to make his report on said matter, that up to the time of the commencement of this suit no report had yet been made, all to the plaintiff's damage in the sum of twenty-five hundred dollars.

EXHIBIT "A."

To the Honorable Mayor and Common Council of the City of Sault Ste. Marie, Michigan:

Gentlemen—Now comes Helen Jefferson of the City of Sault Ste. Marie, Michigan, according to the provisions of the charter of the City of Sault Ste. Marie, claiming damages for personal injuries sustained on Spruce street sidewalk by reason of the defective, obstructed, unsafe and dangerous condition of said walk, and that the date and particulars of said injury are as follows:

The injury occurred on, to-wit, the 10th day of February, A. D. 1909, at about three o'clock in the afternoon.

The particulars of the injury are:

That while going east on the walk on the south side of said street and when about from six to twelve feet east from Ashmun street, and while walking and exercising due care, I had occasion to move to the right slightly to pass two ladies that I met at that point, and in doing so I stepped on the side of the slope of high ridge of ice and snow that extended along the walk, and which ridge of ice and snow was caused by the drippings of an eave that projects from said building and over the walk, and the use of the snow plow which left the high ridge with a steep slope to it, so that upon stepping upon the side of the slope of said ridge my feet slipped out from under me and caused me to fall across the ridge of ice and snow, breaking my left leg near the left joint, and otherwise greatly injuring me, whereby I have suffered great pain and have had medical attendance, have been confined to my bed, and will be, as my physician advises me, for a long space of time in the future, and that I have been thereby greatly and permanently injured, and for which I have suffered and will claim heavy damages from the city.

EXHIBIT "B."

To the City Comptroller of the City of Sault Ste. Marie, Mich.:

Take notice, that in accordance with the provisions of Section 18, of Chapter VI. of the city charter, being Compiler's section 116 as amended, I, Helen Jefferson, hereby present you with my claim for damages against the city, with the information required to be given under said section as follows:

1. The injury for which I claim damages against the city occurred on the 10th day of February, A. D. 1909.

2. The place of injury was on the sidewalk on the south side of Spruce street about from six to twelve feet east from Ashmun street, in the City of Sault Ste. Marie, Michigan.

3. The cause and manner of such injury and facts connected therewith are as follows:

That on the said 10th day of February, 1909, about three o'clock in the afternoon, while walking I had gone easterly along the sidewalk on the south side of Spruce street from Ashmun street, and had proceeded but a short distance, from 6 to 12 feet from Ashmun street, where I met two ladies, and upon moving slightly to the right to pass them, I stepped on the side or slope of a high ridge of ice and snow that extended along lengthwise of the walk, and in stepping on the side of the slope of said ridge, my feet slipped out from under me and I fell across the ridge of ice and snow, breaking my left leg near the hip joint and otherwise greatly injuring me. The sidewalk extends along the side of the Eady store building, which building is on the property line. On this building, there is an eave projecting out from the side of the building some 12 or 15 feet up and from and over the sidewalk. The ridge of ice and snow was caused by the drippings of water from this eave and from the use of the snow plow which left a high ridge of ice with a steep slope on each side and particularly on the south or inside of said ridge.

The names of the persons present, so far as known to me, when such injury was received, are as follows: Byron C. Campbell and Thomas Blain. I understand Dr. George P. Ritchie saw me fall from his office. The two ladies whom I met and who tried to lift me on my feet, but whose names and addresses I do not know.

5. The amount of damages claimed by reason of such injury is twenty-five hundred dollars.

HOOKER, J. The plaintiff slipped and fell on an icy sidewalk in the city of Sault Ste. Marie, thereby breaking a leg. She has recovered a judgment of \$700 against the city, which has appealed,

The negligence charged is: First. That the city was negligent in allowing a ridge of snow to remain in the center of the walk as a result of cleaning the snow with a snowplow. Second. In permitting ice to form upon said walk and ridge as a result of water dropping upon it from a 10-inch wooden projection on the face of an adjacent building from the melting of snow upon it.

Sault Ste. Marie is shown to have 33 miles of sidewalks, and these are cleared with snowplows at city expense. There is much testimony to the effect that a snowplow does not and cannot clear the walk in the center as well as it does at the edges of the walk where people have not trodden. This is a fact of common knowledge and has been mentioned several times in decided cases. In *McKellar v. Detroit*, 57 Mich. 158, 23 N. W. 621, 58 Am. Rep. 357, it was said: "A few passers-by would trample the snow into ridges, and the work of removing them would be enormous."

In the case now before us several witnesses testified that this walk was in much the same condition as to a ridge of snow or ice in the center as all of the walks in town, and we have discovered no substantial contradiction of this testimony. We cannot hold, and a jury should not be permitted to find, that a city is liable for not clearing walks. We have held many times that the statute imposes the duty upon cities to keep streets in reasonable repair and in a condition reasonably safe for public travel. Hence we find many cases holding cities negligent in placing or permitting sand piles, building materials, and other obstructions in the ways. On the other hand, we have often held that accumulations of snow and ice which come from natural causes are not covered by the statute, and that a city is not negligent if it omits to protect footmen from the dangers to life and health, which attend the use of street and walks, covered with snow. Even the danger of falls in slippery places on ice upon the walks is one against which the pedestrian must protect himself ordinarily, for the city is under no obligation to remove either snow or ice.

There are, however, some cases where cities have been held liable for creating obstructions with snow or ice; cases, as plaintiff's counsel say, "where the city was an active agent in placing the obstructions," *e. g.*, in *Bowen v. Detroit*, 150 Mich. 546, 114 N. W. 344. When the employees of the city engaged in cutting ice out of a gutter were said to have thrown chunks of ice and snow upon a crosswalk upon which plaintiff fell, which was disputed, we said the court should have submitted the question to the jury, thereby implying, if not expressly deciding, that a city might incur a liability for cutting and piling ice upon its crosswalks. The case of *Johnson v. Marquette*, 154 Mich. 51,

117 N. W. 658, was a somewhat similar case, where a city was held negligent in permitting a steam railroad company to pile snow removed from its highway crossing upon each side of its track in the highway, whereby a team of horses were frightened and injured third persons. The case recognized the general rule and rests upon the artificial character of the obstruction, and is easily within the said cases mentioned. It is upon these two cases that counsel predicates his contention in the present case, claiming that the Marquette case and this are alike in principal, *i. e.*, that the obstruction in the Marquette case was an obstruction caused by throwing snow from one part of the street to another, thus forming a ridge, or obstruction, while, in this present case, the ridge or obstruction was caused by leaving a portion of the hard icy snow in the center of the walk, and removing the untrodden snow from each side, thus making a ridge.

Every person knows the convenience of cleaning paths in winter. Every one does it to some extent and has to do for the convenience of himself and family. We know how the good citizen cleans his sidewalk. In the center where men tread the snow accumulates because of the difficulty in getting it off, but he does not refrain from keeping the walk more nearly clean near the edges. But every one does not clean his walk well or seasonably. It is at least questionable whether he ought to be or can be compelled to do so for public convenience, and, moreover, the cheaper, more expeditious method, and the only fair and economical and practical way, is to run an old fashioned snow plow over the walk for the purpose of taking, not all ice and snow, but no ice and only so much snow as can readily be removed by scraping with so rude a contrivance as a snow plow. This method and this degree of efficiency are accepted and approved by the community, as appears from their general adoption, and it is reasonable to suppose that society has not understood that it is to be penalized for its effort toward the ameliorations of the annoyance and inconvenience of snow and that the effort to aid all carries with it the responsibility of removing ice as well as snow to which the plow is not adapted, and which was not within the design. Neither has it the obligation of seeing to it that the snow where undisturbed shall not be removed below the level of the packed portion where removal is not feasible or is too expensive. Nor need it remove all ice on one or both portions which may result from the falling or dripping of water from buildings upon the walk. It seems to us more reasonable to say that we may take judicial notice of the everyday necessities and practices that the removal of snow as it falls is for the welfare of all, that such removal down to as near the walk at any or all points,

as is reasonably feasible, is desirable and proper, that such inequalities as this, which are known to be inevitable, are the necessary accompaniment of this very necessary and commendable practice, and private misfortunes arising from the casualties of winter furnish little excuse for attempting to impose the burden resulting to individuals upon the community. They certainly do not, in our opinion, justify the extension of the rule followed in the cases mentioned.

It is not difficult to see that the principle relied on in those cases is not necessarily involved here, for the city has not placed snow and ice under the feet of its citizens, but has merely taken some away, thereby attempting and making an improved condition. By looking at the authorities a little further, we will find the limitations mentioned well and clearly pointed out.

In *McKellar v. Detroit*, 57 Mich. 158, 23 N. W. 621, 58 Am. Rep. 357, this court said that: "The statute in giving a right of action for injuries from defective highways, etc., * * * applies only to injuries that are due to defects from being out of repair, and not such as are due to accumulations of ice or snow." In treating of that accident, which, like the one in this case, was a fall upon ice, the court said: "There is probably not a single northern city or town where such accidents as that appearing on this record do not occur every year. The courts would present much more numerous precedents if it were the general supposition that such actions would lie. We have never had a Michigan statute which made express provision for removing snow and ice, and the laws regulating highway labor and the expenditure of highway moneys are all framed on the theory that work will be done when the earth is uncovered. Our cities are empowered to clean their streets, and frequently to remove snow and filth; but this has seldom if ever been made obligatory, or treated as having anything to do with street repairs or defects. It is possible that highway money may have been expended in towns and villages to clear the tracks in winter; but, if so, the instances are exceptional, and not within the language of any statute. * * * Our statutory system has been devised to meet the necessities of a rapidly developing country, thinly settled in many places, and with cities covering much larger spaces than would be required for a stationary population. It would be a great hardship and involve ruinous expense if all of the multitudinous ways that are subject to be affected by winter storms are to be constantly watched and diligently kept in thoroughly good condition. Most communities may be relied on to do what is necessary and feasible. But no amount of diligence can supply an adequate force and adequate means to detect the inevitable accumulations of snow

trampled into hardness on every crosswalk or in every roadway. In the city of Detroit it is estimated that there are more than 10,000 crosswalks inside of the suburbs. Except during winter there is not much risk that dangerous defects will be noticed or unnoticed. A walk properly laid may be relied on, except as against very long wear or active mischief. But a few passers-by will trample the snow into ridges, and the work of removing them would be enormous. The charter makes no adequate provision for doing it, or for finding out its necessity."

The next case involving a charge against a city in an ice or snow case was *Kannenberg v. Alpena*, 96 Mich. 53, 55 N. W. 614. In this case a freshet choked a catch-basin, and water overflowed the walk and froze. We held that this was not an artificial obstruction, but one due to natural causes, and denied relief. In this case counsel relied upon some cases where cities had neglected hydrants or water-spouts, whereby water overflowed and froze upon walks. We distinguished these from ice formed by natural causes and later refused to follow the latter in *Gavett v. Jackson*, 109 Mich. 408, 67 N. W. 517, 32 L. R. A. 861.

Rolf v. Greenville, 102 Mich. 544, 61 N. W. 3, was a case which shows another phase of this question. We are unable to tell whether a snow-plow was used or not. At all events, the walk was covered by snow which melted off more toward the edges and left ice where it had been trodden, and plaintiff slipped and fell. The situation was practically the same as in this case, viz., the removal of only a portion of the snow, and the sloping ridge, if the name "ridge" is either in that or this case an appropriate term to use. It was held to be ruled by the *Kannenberg Case*, *i. e.*, the Legislature had not imposed the duty to provide against the accidents resulting from snow and ice due to natural causes, as Mr. Justice Campbell had said in that case.

Hutchinson v. Ypsilanti, 103 Mich. 12, 61 N. W. 279, is also in point. Here it was held that the removal of snow from walks and street car tracks into the gutter, when they changed to ice upon which plaintiff's cutter was overturned, was not negligence on the part of the city.

Gavett v. Jackson, 109 Mich. 408, 67 N. W. 517, 32 L. R. A. 861, was a case where ice froze from water which came from a roof through a down spout and was delivered on the walk. In that case the contention was made that the city was negligent in not preventing this, and one opinion in the case sustained the plaintiff's contention. The majority, however, followed the earlier cases, and held that this ice was formed from natural causes, and that the city was not liable for not providing some way for keeping it off from the walk, or preventing

the formation, or taking steps to remove the ice. Mr. Justice Grant recognized the rule regarding artificial obstructions applied in the first mentioned cases, but said that it had no place upon that record.

Again, the rule was applied in *Wesley v. Detroit*, 117 Mich. 659, 4 Am. Neg. Rep. 651, 76 N. W. 104. See, also, *Pringle v. Detroit*, 152 Mich. 445, 116 N. W. 362.

There is another class of snow cases, such as *Canfield v. Railway Co.*, 78 Mich. 356, 44 N. W. 385, and *Black v. City of Manistee*, 107 Mich. 60, 64 N. W. 868, where liability is made to rest upon the effect of a defect in the construction of the road or way as a cause of the injury. Such a case is *Navarre v. Benton Harbor*, 126 Mich. 618, 86 N. W. 138. We are of the opinion that the present case is fully covered by the cases cited, and that whether the cause of the fall was ice made by reason of water for which the city was in no way responsible, or from snow which was trodden down and tramped in and frozen, or from the crowning snow left on the walk through the inability of the city to scrape the hard snow, no liability exists. We are of the opinion that the judgment should be reversed, and no new trial ordered.

TURGEON V. CONNECTICUT COMPANY.

[SUPREME COURT OF ERRORS OF CONNECTICUT, JULY 31, 1911.]

84 Conn. 538.

1. Amusements—Miniature Railway—Contributory Negligence—Question for Jury.

One who, while listening to a band in an amusement park, stands with his back towards the track of a miniature railway some four or five feet away, is not, as matter of law, chargeable with negligence contributing to his injury sustained when the engine jumped the track.

2. Amusements—Park—Duty of Proprietor.

The proprietor of an amusement park, to which the public is invited, must exercise reasonable care to keep the premises reasonably safe for visitors, whether admission is charged to the grounds or not.

3. Amusements—Miniature Railway—Independent Contractor.

The owner of an amusement park is not relieved from the duty of exercising reasonable care in the construction, maintenance and operation of a miniature railway, by leasing it to an independent contractor, especially when a general supervision of the property is retained.

4. Amusements—Miniature Railway—Injury—Negligence.

A nonsuit should not be granted in an action to recover damages for personal injuries sustained when an engine operated on a miniature railroad jumped the track, where the evidence discloses that the roadbed was in bad condition and that, although the engine had frequently left the track at the curve where the accident occurred and where people were likely to be assembled, no guard rail had been erected or warning given.

Appeal by plaintiff from a judgment of nonsuit rendered by the Superior Court of New Haven County, in an action brought to recover damages for personal injuries caused by being struck by an engine upon a miniature railway operated in an amusement park. Error.

CASE NOTE.**Liability for Injuries on Miniature or Scenic Railway or Similar Device.**

The operator of a scenic railway is bound to use the highest degree of care and caution for the safety of its patrons, and to do all that human care and foresight can reasonably do, consistent with the mode of conveyance and the practical operation of the railroad, to prevent accidents to patrons

while riding upon its cars. O'Callaghan v. Dellwood Park Co., 242 Ill. 336, 26 L. R. A. (N. S.) 1054 (1909).

A presumption of negligence on the part of the operator of a scenic railway, sufficient to carry to the jury the question of liability, arose from the sudden stopping of a car on the railway, apparently caused by something on the track, which was not a part of its ordinary operation, and which caused a passenger to be thrown out

For appellant—Arthur B. O'Keefe, and Walter J. Walsh.

For appellee—Harry G. Day, and Harrison T. Sheldon.

WHEELER, J. Evidence was received tending to prove the following facts: The defendant railway owned and maintained an amusement park at Savin Rock to which it invited the public and its patrons to come, and there provided various attractions and entertainments, which it owned and leased to different persons. It maintained an office in the park and had a general manager there, who had general supervision of the park.

One of the attractions which the defendant owned and leased, was a miniature railway, operated and controlled by the lessee. In the center of the park was an artificial pond, pear shaped, around which was a concrete walk. Imbedded in the concrete walk was a narrow gauge railroad track, having fixed rails, laid upon ties, for the locomotive and car of the miniature railroad to run upon. The rails were on a level with the walk, and no part of the track was visible in the walk, except the rails. The track passed from the walk into a tunnel and emerged from the tunnel on the other side of the pond. At the approach to and exit from the tunnel, the track curved, as it does at the point opposite the bandstand and just across the pond from this point. The public used this concrete concourse as a promenade.

On the night of the accident, the defendant provided a free band

and injured. *O'Callaghan v. Dellwood Park Co., supra*. The court said: "If the injury of a passenger is caused by apparatus solely under the control of the carrier and furnished and managed by it, and the accident was of such a character that it would not ordinarily occur if due care is used, the law raises a presumption of negligence. This presumption arises from the nature of the accident and the attending circumstances, and not from the mere fact of the accident itself."

The facts in *Lumsden v. L. A. Thompson Scenic R. Co.*, 130 App. Div. 209, 114 N. Y. Supp. 421 (1909), as disclosed by the opinion are as follows: "The plaintiff testified that on the 24th day of June, 1905, she went to Coney Island, and while there was invited to take a ride on this scenic railroad with her

companion; that the fare was 10 cents; that she got on a small open car with three or four seats; that, as she was going around on this railway on the second dip, the car gave a lurch forward, and she was thrown out. Upon cross-examination she testified that she knew what a scenic railway was; that she knew the cars went up and down these inclines, and that was the attractive feature of the entertainment; that her companion wanted to take the ride, and she went with him; that the other members of the party would not go, as they said it was unsafe; that she went on the car with the knowledge that it was rather unsafe and made objection to the car because there was nothing to hold on to; that she got on the car for the purpose of going up and down these inclines and declines, and

concert, and among the crowd of persons listening to it was the plaintiff, who could not procure a seat, but stood facing the bandstand, with his back to the promenade, and some four or five feet from the railway track. While so standing, the engine, weighing about a ton and drawing a car, when going at the rate of five or six miles an hour, left the track and ran into the plaintiff, his wife, and a friend.

There was no guard rail at this curve where the engine left the track, or any warning signs to indicate danger, or that the engine might jump the track, and the plaintiff did not know of such liability through warning or otherwise.

The track had been and then was in bad condition, the rails having spread in the tunnel and at the entrance to and exit from the tunnel, and at the curve at the exit from the tunnel there had been placed a guard rail to keep the engine and cars on the track. The roadbed was bad; in places new ties were needed. The engine had frequently left the track at the curve at the exit from the tunnel, and because of this the guard rail had been placed alongside the track.

The plaintiff did not know of the condition of the track or rails, or of the liability of the engine to jump the track, and it is difficult to understand how, in the exercise of ordinary care, he could have been expected to know this. He was in a place which the defendant had provided for him, enjoying the concert which the defendant furnished, and it would seem not unreasonable to have accorded to him the right to assume that the defendant had exercised reasonable care

selected her own seat. She admitted that the arm of the seat on the car was so constructed that she could hold on to it if she wanted to. Upon this evidence the plaintiff rested, and an officer of the defendant testified that the defendant operated 13 of these scenic railways, carried 5,000,000 of people each year, and over 20,000,000 of people had been carried in them within the last four years; that no one had ever been thrown out of these cars, so far as he knew, except the plaintiff; that these cars are carried to the top of the incline by electric power, and then fall by their own momentum. There was also evidence that the plaintiff jumped off the car and that the car made no sudden or unusual jolt. There is no evidence that the cars were

out of order, that anything broke, or that anything unusual happened. The question as to whether there was a jolt which threw the plaintiff off the car was submitted to the jury, who found a verdict for the plaintiff." In reversing the judgment of the lower court, the court, on appeal, held that a passenger riding on a scenic railway, the attraction of the riding consisting in the sensations caused by the rapid change of motion, who was warned of the danger of riding thereon, assumed the risk of injury caused by the usual motion of the car, which necessarily jerked when descending inclines, there being no proof that the jerking was unusual or more severe than must have been anticipated by passengers.

One who operates a merry-go-round,

to make the place it had invited him to reasonably safe. Whether this conclusion should be drawn or not, it is entirely clear that it was one for the jury; it cannot be said, as matter of law, that the plaintiff was himself in fault. The principal ground upon which the ruling on the nonsuit is justified is that there was no evidence to support the negligence charged.

It makes no difference whether admission was charged to the grounds or not. The amusement park was conducted as an attraction to its patrons by the railway company, in order to hold and increase its traffic. The plaintiff was there by the invitation of the defendant. One who invites others to come upon his premises for business or pleasure must exercise reasonable care to have and keep the premises reasonably safe for such visitors.

The defendant is not relieved of this duty, because he had leased the miniature railway to an independent contractor. Note to *Hollis v. Kansas City Mo. R. Ass'n*, 14 L. R. A. (N. S.) 284 [205 Mo. 508, 103 S. W. 32, 1 N. C. C. A. 612n]; *Thornton v. Maine State Agricultural Fair*, 97 Me. 108, 13 Am. Neg. Rep. 302, 53 Atl. 979, 94 Am. St. Rep. 488; *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. Law, 624, 8 Am. Neg. Rep. 884, 46 Atl. 631, 50 L. R. A. 199, 81 Am. St. Rep. 512; *Richmond & M. R. Co. v. Moore*, 94 Va. 493, 505, 2 Am. Neg. Rep. 473, 27 S. E. 70, 37 L. R. A. 258; *Texas State Fair v. Brittain*, 118 Fed. 713, 56 C. C. A. 499; *Conrad v. Claire*, 93 Ind. 476, 47 Am. Rep. 388.

It was the defendant's place of amusement; it was its invitation

upon which the public is invited to ride on payment of a small sum, is bound to provide a safe vehicle, machinery, appliances, guards, approaches, and must use great care, diligence and skill in managing and operating the device, and precaution to protect patrons from injury. *Linthicum v. Truitt* (Del. Super.), 80 Atl. 245 (1911).

A roller coaster or switch-back, was held in *Knottnerus v. North Park St. R. Co.*, 93 Mich. 348, 17 L. R. A. 726 (1892), not to be an apparatus of such dangerous character that permission to operate the same at a pleasure resort owned by a street railway company, and advertised as one of the attractions of the place, as will make the company liable for the negligence of the person who owned the ap-

paratus, in consequence of which one riding thereon was injured by the derailment of the switch-back car. The court said that by granting to another privileges to operate devices at amusement parks, the owners of such parks do not thereby become insurers against accidents to persons who patronize the lessee.

An association conducting a fair, was held liable in *Hollis v. Kansas City, Missouri, Retail Merchants' Ass'n*, 205 Mo. 508, 14 L. R. A. (N. S.) 284 (1907), for an injury sustained by a patron while riding in an apparatus known as a "gondola" caused by a defect therein, which was operated for the amusement of the patrons of the fair, by a concessionary on a circular track and so constructed that the cars

which brought the plaintiff there; and it retained, despite its concessionaries, a general supervision and care of the property. It was the duty of the defendant to use reasonable care to keep every part of the grounds to which it had invited the plaintiff in a reasonably safe condition, and to accomplish this end it was its duty to use reasonable care to see that the railway was so built, maintained, and operated as not to risk doing injury to any of its patrons while in the park. *Thompson v. Lowell, L. & H. St. Ry. Co.*, 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323; *Blakeley v. White Star Line*, 154 Mich. 635, 637, 118 N. W. 482, 19 L. R. A. (N. S.) 772, 129 Am. St. Rep. 496; *Thornton, Adm'r v. Maine State Agric. Fair*, *supra*; *Richmond & M. R. Co. v. Moore*, *supra*; *Texas State Fair v. Brittain*, *supra*; *Conrad v. Claure*, *supra*; *Dunn v. Agricultural Society*, 46 Ohio St. 93, 18 N. E. 496, 1 L. R. A. 754, 15 Am. St. Rep. 556; *Manstad v. Swedish Brethren*, 83 Minn. 40, 43, 85 N. W. 913, 53 L. R. A. 803, 85 Am. St. Rep. 446; *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788; *Brown v. Batchellor*, 29 R. I. 116, 69 Atl. 295; *Cooley on Torts*, p. 605.

Upon the evidence before the jury, might the conclusion have been reasonably reached that the accident resulted from the failure of the defendant to use reasonable care to keep its premises reasonably safe for its patrons? If the evidence supported such a conclusion, the motion to set aside the nonsuit was improperly denied; if the evidence did not support such a conclusion, it was properly decided.

The jury might have found that the defendant knew that if the engine left the track it was liable to run into and injure its patrons and those who chanced to be near the track upon the walk in which the rails were imbedded, and that with the bandstand within less than 40 feet of the railway the crowd listening to the music would be brought close to the track, and if the engine left the track it would be liable to injure some in the crowd. It might have found that the engine had frequently left the track at a curve, due probably to the spreading of the rail or the condition of the track. It knew that a guard rail was a necessary precaution to prevent this at a curve, since it had adopted this precaution at the curve, at the exit from the tunnel. It

would revolve, where the association received a portion of the sum paid for the use of such apparatus, had general control over the fair grounds, and took an important part in advertising the amusements.

The declaration was held not to be subject to demurrer in Washington

Luna Park Co. v. Goodrich, 110 Va. 692 (1910), which was an action brought to recover damages for personal injuries sustained by a passenger for hire, caused by a collision between two cars on a roller coaster operated by the defendant in a negligent manner.

might have found that the rails had spread in these places, where there were curves. It might have found that the engine left the track because of the defective condition of the roadbed, and the failure to have a guard rail at this curve. It might reasonably have found that ordinary care towards its patrons required this defendant to have seen that the road bed was in better condition, and a guard rail placed at this curve, or that the defendant should have warned its patrons of the liability of the engine leaving the track, and the consequent risk to them.

The evidence uncontradicted would have supported a verdict; and hence we have no occasion to consider the doctrine of *res ipsa loquitur* invoked in behalf of the plaintiff.

There is error. The other Judges concurred.

**HELPHAND v. INDEPENDENT TELEPHONE COMPANY OF
OMAHA et al.**

[SUPREME COURT OF NEBRASKA, FEBRUARY 28, 1911.]

88 Neb. 542.

Waters—Damage by Surface Water.

Where damage is caused by surface water negligently collected in a ditch or trench dug through a public alley, and thence allowed to soak through a sewer connection previously constructed into a basement of an adjacent building, the fact that the owner or occupant of the building in making his sewer connection failed to tamp the earth replaced therein sufficiently to render it impervious to water does not constitute contributory negligence.

[Headnote by the Court.]

Appeal by plaintiff, Julius Helphand, from a judgment of the District Court of Douglas County, rendered in favor of defendants, the Independent Telephone Company of Omaha and the Union Telephone Construction Company, in an action brought to recover damages for goods injured by surface water negligently collected in a ditch. Reversed.

For appellant—H. C. Brome and Clinton Brome.

For appellee—Benj. S. Baker.

BARNES, J. Action for damages to a stock of goods by surface water alleged to have been negligently collected in a ditch dug by defendants and thence thrown into the basement of a building occupied by the plaintiff. It appears that plaintiff was the owner of a stock of gents' furnishing goods, a part of which were stored in the basement of a building situated in the city of Omaha and occupied by him; that in the month of August, 1907, defendants, in constructing certain telephone lines in that city, dug a ditch or trench to be used as a conduit for its wires through a public alley adjacent and in close proximity to the plaintiff's building, and left it in such a condition that the heavy rains which fell in that season of the year were collected therein and thence escaped into the basement and damaged plaintiff's goods. There was no dispute as to the foregoing facts. Defendants, to defeat a recovery, claimed that when they were digging

NOTE.

On the subject of Liability for Injuries to Property Caused by Overflow

of Surface Water, see note in 21 Am Neg. Rep. 479.

the ditch in question their workmen discovered that at some prior time a sewer connection extending from the basement of plaintiff's building across the alley had been made, either by the plaintiff or by his grantor; that the earth replaced in the sewer trench had not been sufficiently tamped to render it impervious to water, and by reason thereof the surface water collected in the ditch soaked through the sewer trench into the plaintiff's basement and caused the damage of which he complains. It was therefore contended that the plaintiff was guilty of contributory negligence.

It appears that the trial court, after correctly instructing the jury as to the defendants' legal duties and liabilities, by another instruction, submitted the question of contributory negligence to the jury. The giving of that instruction is assigned as error which plaintiff strenuously contends entitled him to a new trial. The argument of the defendants in support of the instruction is that both parties had an equal right to the use of the public alley, in which their conduit was being constructed, and therefore the plaintiff owed them the duty to so construct the sewer connection as to render it impervious to the water which they collected and allowed to flow into their ditch and by failing to do so he was guilty of contributory negligence. Counsel has cited no authorities to support this argument, and we doubt if any can be found by which it can be sustained.

On the other hand, the plaintiff asserts that the evidence shows conclusively that, when the earth was replaced in the sewer excavations and the paving replaced thereon, the alley was left in a safe, suitable, and proper condition for the public use; that no surface water had thereafter penetrated the basement of his building; and he therefore insists that, having done all that was required of him, both for the protection of the public and his own property, he owed no additional duty to the defendants and could not be said to have been guilty of contributory negligence. This contention seems to be well founded. It appears that, when the sewer connection was made, neither the plaintiff nor his grantor owed any duty to the defendants, and, when defendants entered upon the construction of their conduit, it was their duty to so construct the ditch as not to injure the property of the plaintiff who was an abutting lot owner.

In the case of *Cook v. Champlain Transportation Co.*, 1 Denio (N. Y.) 91, it was said: "Where one, in the lawful use of his own property exposes it to accidental injury from the lawful acts of others, he does not therefore lose his remedy for an injury caused by the culpable negligence of such other persons." The rule is to so use one's own as not to injure others, and not, as the defendants contend, to use your

own so that another shall not injure your property. In other words, one cannot lawfully use his own property, or exercise his rights in such a manner as to increase the risk or danger of injury to another's property. In *Miles v. Postal Tel. & Cable Co.*, 55 S. C. 403, 415, 33 S. E. 493, 498, it was said: "On the contrary, it behooves a telegraph company, in its legal use of a way or road, or even a highway or post road, to guard such use so that no injury shall result to the property of its owner which may be located opposite such telegraph lines, through its negligence or want of due care." Speaking of the rule of contributory negligence, it is said in 29 Cyc. p. 516: "This rule is subject to the exception that, as a person is entitled to use his own premises for any lawful purpose, his failure to protect it from the negligence of another will not be contributory negligence." The text above quoted is well supported by the following authorities: *Werner v. Cincinnati*, 23 Ohio Cir. Ct. R. 475; *Yik Hon v. Spring Valley Waterworks*, 65 Cal. 619, 4 Pac. 666; *Martin v. North Star Iron Works*, 31 Minn. 407, 18 N. W. 109; *Stone v. Hunt*, 114 Mo. 66, 21 S. W. 454; and many others.

We are therefore of opinion that the question of contributory negligence does not arise in this case, and that the trial court erred in submitting that question to the jury by the instruction of which the plaintiff complains.

The judgment of the District Court is therefore reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

SEDGWICK, J., (dissenting). It is said in the majority opinion that "the trial court, after correctly instructing the jury as to the defendants' legal duties and liabilities, by another instruction, submitted the question of contributory negligence to the jury," and that this was erroneous, requiring a reversal. If, after correctly instructing as to defendants' legal duties and liabilities, it is erroneous to submit the question of contributory negligence to the jury, it must be that no matter how negligent the plaintiff may have been in constructing their part of the trench which caused the damage, and however careful and diligent the defendants have been in constructing its part and in seeking to prevent the ordinary effects of plaintiff's own negligence, the defendants are still liable for damages. This cannot be the law. The defendants argued that the plaintiff or his grantor in making the sewer connection owed the duty to the defendants as well as others to properly construct the same so as to prevent water from running into his (the plaintiff's) own basement. This argument

is a little misleading. The plaintiff owed the duty to the defendants and others to construct the sewer connection so as not to injure the defendants or others who rightfully used the alley, but upon the point involved in this case the duty which the plaintiff owed was not so much to the defendants as it was to himself. He owed a duty to himself to make his sewer connection so that water from the alley would not flood his basement. Suppose that both trenches had been dug at the same time; that the plaintiff had dug the sewer trench and the defendants the trench for the telephone cable, and both trenches had been negligently dug and negligently filled, would it be true that, if the jury should find that if the plaintiff had filled his part of the trench properly there would have been no damage, still the plaintiff could have recovered? Of course, if the defendants in digging their trench and filling it found that the plaintiff's sewer trench was imperfectly filled, and that damage was liable to ensue on that account, and then the defendants should have been the more careful to avoid damage, since the sewer trench had been made a long time before the plaintiff might probably not be aware of its condition. If the defendants disregarded the danger of damages that might be caused from the conditions which they found in making their trench, they might still be liable for damages notwithstanding the imperfect conditions of the plaintiff's trench. But this point was fully and carefully guarded by the court in its instruction No. 5. The court instructed the jury to the effect that, when the defendants found that the plaintiff's part of the trench was not properly constructed, it would be the duty of the defendants to use correspondingly greater precaution to prevent damage to plaintiff's property, and that, if in constructing its part of the trench the defendants "came upon the previously constructed sewer ditch leading to the basement of said building, the exposed condition of which was of such a nature as it was known to defendants or should have been known to it in the exercise of ordinary care, that there was danger that surface water flowing into or upon defendants' trench would the more readily flow into and through said sewer trench and into plaintiff's dwelling, then defendants would be required to exercise such degree of care to prevent such accidents as would be commensurate with the increased danger and circumstances surrounding the situation."

A similar instruction was requested by the defendants, and the correct theory upon which the case was tried appears to be that, if the plaintiff negligently constructed his part of the trenches in question, so that there would have been no damage if he had properly constructed the same, and the defendants, when they discovered the

faulty condition of the plaintiff's trench, use such reasonable and proper precautions as an ordinarily prudent man would use to prevent the defects in the plaintiff's own trench and causing him damage, the defendants would not be liable. The questions tried were: First, were the defendants negligent in constructing their part of the trench? Second, did the plaintiff negligently construct his trench? Third, if the plaintiff's trench was negligently constructed, did the defendants, when that fact was discovered, use all reasonable precautions to prevent damage as the result of the plaintiff's own negligence? The last two propositions were determined in favor of the defendants by the jury upon "correct instruction as to the defendants' legal duties and liabilities," as said in the majority opinion, and, if so, their verdict ought to settle the matter.

SMITH v. MARION FRUIT JAR & BOTTLE CO.

[SUPREME COURT OF KANSAS, APRIL 8, 1911.]

84 Kan. 551, 114 Pac. 845.

1. Negligence—Unguarded Power Fan—Injury to Boy.

Evidence that a boy thirteen years of age was fatally injured by putting his hand in contact with a power fan, maintained in an unguarded condition, in connection with a factory, at a place accessible from the outside, where children were permitted to play justifies a finding of actionable negligence on the part of the owner.

2. Death of Son—Action by Father—Negligence—Attendance at School.

In an action by a father for the negligent death of his son while employed in a factory, the fact that he consented to such employment is not a bar to a recovery, notwithstanding it was his duty under the statute to have had his son at school.

[Headnotes by the Court.]

Appeal by defendant from a judgment of the District Court of Montgomery County, rendered in favor of plaintiff in an action to recover damages for the negligent death of his son. Affirmed.

For appellant—Osborn & Keith.

For appellee—H. B. Williams, and George Campbell.

AMENDED PETITION.

Now comes the above plaintiff, J. W. Smith, and for his cause of action against the above named defendant, The Marion Fruit Jar & Bottle Company, a corporation, alleges and says:

That the defendant, The Marion Fruit Jar & Bottle Company, was during all of the time hereinafter mentioned in this amended petition, a corporation, duly organized, created and existing under and by virtue of the laws of the State of Indiana, and that the said defendant was at all the times hereinafter mentioned, engaged in the manufacture and sale of fruit jars and in maintaining and operating a factory

NOTE.

On the subject of the Doctrine of Contributory and Imputed Negligence, Sui Juris, and Assumption of Risk as Applied to Children, see note in 15 Am. Neg. Rep. 684.

And on the subject of Liability for Injuries to Children Caused by Dangerous Attractions, see notes in 12 Am. Neg. Rep. 508 and 21 Am. Neg. Rep. 293.

And on the "Turntable Cases" Doctrine, see note in 9 Am. Neg. Rep. 611.

for the manufacture thereof, at and near the city of Goffeyville, Montgomery County, Kansas.

That on the 8th day of January, 1904, and for a long time prior thereto, the said defendant did use, maintain and operate machinery consisting of engines, shafts, pulleys and a blast fan necessary in the operation of its said factory; that said machinery was and is of such a kind and character as to be attractive and alluring to the many children who were and are permitted by the said defendant, its agents, and employees, to visit the said factory, and that said machinery was, during all of the times herein mentioned, located in the building of said factory belonging to said defendant and used by it.

That on the 8th day of January, 1904, and for a long time prior thereto, the said defendant had in its employ many children, whose age ranged from ten to sixteen years. That among said children the said defendant had in its employ one Stinson Smith, a child between the age of thirteen and fourteen years. That on said date, and while the said Stinson Smith was still in the employ of said defendant and while in said factory, he came in contact with and was caught in a certain blast fan, which said blast fan was about five or six feet in diameter and was being operated at a great rate of speed by means of an engine and a belt attached thereto and located in a building of said factory known as "the fruit jar building" thereof; and that said Stinson Smith was on the said date engaged in the usual course of his employment in the said building.

That said defendant recklessly, wantonly and negligently maintained and operated said blast fan in the factory building aforesaid, on the 8th day of January, 1904, and for some time prior thereto in a manner and condition so as to be dangerous to all employees of said defendant working in said building, or any persons that might come or be in the immediate vicinity thereof. That said blast fan was not guarded, picketed or railed in nor supported by any guard to prevent accidents or injuries to those employed at or near said blast fan or any other persons who might come in the immediate vicinity thereof. That on said date said blast fan was being operated at a great rate of speed and thereby caused great suction force; that said blast fan rested on a base on a level from twelve to fourteen inches lower than the floor surrounding or adjacent thereto, and said floor sloped in the direction of the said blast fan on an angle of about thirty-two degrees, and that said floor on said date was covered with brickbats and loose dirt, all of which defendant well knew, or by reasonable diligence might have known.

That on the 8th day of January, 1904, the said Stinson Smith

came in contact with and was caught in the said blast fan, and thereby received injuries to his person from which said injuries he died on the date last mentioned.

That this plaintiff was during all the times mentioned in this amended petition, the father of said Stinson Smith and a resident of Montgomery County, Kansas.

That said Stinson Smith died seized of no estate of inheritance nor of any interest whatever in or concerning lands and hereditaments and that he did not possess sufficient personal property to warrant administration proceedings. That the appointment of a personal representative was unnecessary.

That no personal representative of said Stinson Smith deceased has at any time ever been appointed in the State of Kansas, and that he was a resident of said State at the time of his death.

That this plaintiff from and after the hour of said Stinson Smith's death, on the 8th day of January, 1904, and now is the only surviving parent of the said Stinson Smith.

That said plaintiff is a cripple and is now and for some years prior to the death of his said son Stinson Smith, has been unable to engage in hard or severe labor. That he is poor and has a large family to maintain; that he depended upon the assistance, wages and earnings of the said Stinson Smith in maintaining, caring for and supporting himself and family.

Plaintiff further alleges that by reason of the reckless, wanton and negligent manner in the construction of and in keeping and operating in its said factory, the said blast fan as a part of the machinery thereof, which said blast fan was calculated to and did attract and allure children who were frequently permitted to be and were in and about said factory with the consent of said defendant, and which blast fan did attract and allure said Stinson Smith, and in coming in contact therewith, and being caught therein, he received such severe injuries to his person from which said injuries he died as aforesaid and by reason of the reckless, wanton and negligent manner of the said defendant in constructing and maintaining the aforesaid floor around and adjacent to said blast fan, which said floor was higher than the level on which the said blast fan was constructed or rested, and which said floor sloped at the angle aforesaid toward said blast fan and was covered with brickbats and loose dirt, and by reason of the reckless, wanton and negligent manner of the said defendant in not placing or constructing the proper safe guards as hereinbefore alleged around said blast fan to prevent persons from coming in contact therewith, or being caught therein, and by reason of the further fact, as herein-

before alleged, that said blast fan, in the manner in which it was constructed and being operated on the day and date aforesaid, was calculated to and did attract and allure the said Stinson Smith, and coming in contact therewith and being caught therein, received severe injuries to his person, from which said injuries he died as aforesaid.

Plaintiff further alleges that by reason of the injuries to and the death of the said Stinson Smith, said plaintiff was caused to and did expend a large sum of money in the funeral and burial expenses of his said son, Stinson Smith, to-wit, about \$80.00, and by reason of the death of the said Stinson Smith, plaintiff has been deprived of his aid, assistance, wages, labor and earnings, and by reason of the death of his said son, plaintiff has been deprived of the company and society of his said son, which has caused this plaintiff to suffer great mental pain and anguish.

Plaintiff further alleges, that for the reasons hereinbefore alleged and stated, he has been damaged in the sum of seven thousand, one hundred fifty (\$7,150) dollars.

That by reason of the reckless, wanton and negligent conduct as hereinbefore stated which was the cause of the severe injuries to the said Stinson Smith's person, and by reason of which said injuries, he died on the day and date aforesaid, the said plaintiff has been further damaged in the penal sum of \$5,000.

Wherefore, the plaintiff prays judgment against the said defendant for the total sum of \$12,150, and the costs of this action and for such other and further relief as to the court may seem just and lawful.

AMENDED ANSWER.

Now comes the above named defendant, The Marion Fruit Jar & Bottle Company, and for its amended answer to plaintiff's amended petition says:

First: That the defendant denies each, every and all, both jointly and singularly, the statements, allegations and averments the said petition contains except such as are hereinafter specifically admitted.

Second: The defendant admits that it is a corporation, and that the plaintiff is the father of Stinson Smith, deceased.

Third: Further answering herein the defendant says that at the time the said Stinson Smith was employed by this defendant, both the plaintiff and Stinson Smith came to the factory of this defendant, and represented to the defendant, its agents, servants and employees, to-wit: Peter Gormley, Patrick Kelly, C. W. Henderson, and various other agents, servants and employees of this defendant, whose names and description the defendant is unable to give at this time, that the

said Stinson Smith was over the age of fourteen years, and that he was sixteen years or more of age; said representations being made both by Stinson Smith and this plaintiff, which representations this plaintiff believed upon and relied upon at the time of employing the said Stinson Smith; that the said Stinson Smith was employed at the request and solicitation of the said plaintiff.

Fourth: That the said plaintiff at the time Stinson Smith was employed by this defendant, and prior thereto, knew the character of the machinery used in the factory of the said defendant including the blast fan and knew the danger of contact therewith, or could with reasonable diligence, have ascertained and known the same. And this defendant, its agents, servants and employees and especially William O'Brien, Peter Gormley, William Hoffman, C. W. Henderson, and Schyler Schmidtsen, and various other agents, servants and employees of this defendant, whose names and descriptions this defendant is unable to give, warned, told and notified the said Stinson Smith to keep in the room in which he was employed to work, and warned him of the danger of the machinery, and warned, told and notified the said Stinson Smith to keep away from the blast fan.

Fifth: That the said Stinson Smith was employed to work in a room a long distance from the blast fan, or the room in which said blast fan was located; that if the said Stinson Smith was injured by the said blast fan, it was by his own negligence and carelessness, and not the fault of this defendant; and if the said Stinson Smith was injured by said blast fan, it was by heedlessly, carelessly and unnecessarily placing his hand in the said fan, going into the room in which the said fan was located, and in going up to and near the said blast fan in violation of the instructions, commands and warnings received by the said Stinson Smith from the defendant, its agents, servants and employees; that the said Stinson Smith was not employed to work with, or near, or about the said fan, but that his work was absolutely disconnected with the said fan, and if he was in the proximity to said fan, it was of his own volition, and not the commands of this defendant, but on the other hand contrary to and against commands and warnings of this defendant and not in line of his employment or duty.

Sixth: Defendant further says that it had no knowledge or information as to the said Stinson Smith's knowledge of machinery or of its operation, at the time it employed the said Stinson Smith, or at any other time; that the plaintiff was fully aware of the said Stinson Smith's experience and knowledge of machinery when he sought this defendant to employ the said Stinson Smith, and at the time the said Stinson Smith was employed by the said defendant.

Wherefore, defendant prays judgments for its costs in this action, and for such other and further relief as to the court may seem right and proper.

MASON, J. In 1904 Stinson Smith, 13 years of age, was employed in the factory of the Marion Fruit Jar & Bottle Company. His hand was lacerated by a power fan and his death resulted. His father recovered a judgment against the company, from which it appeals.

The Child Labor statute (Gen. St. 1909, §§ 5094-5098) is not involved, as it was not enacted until 1905. The Factory Act (Gen. St. 1909, §§ 4676-4683) does not apply because the deceased was not injured while engaged in the duties of his employment. *Brick Co. v. Fisher*, 79 Kan. 576, 100 Pac. 507. The case was tried and determined upon the theory that the defendant was liable under the principle of the "turntable cases;" its negligence consisted in maintaining in an open and exposed position a dangerous piece of machinery which was likely to attract children.

The evidence, as interpreted by the verdict and findings of the jury, must be deemed to have established these facts: The fan was used for forcing air into the factory. It was located under a shed in an open space between two of the buildings, to which there was free access through one of them and also from the outside. It was five or six feet in diameter, and was set upon a cement base so that the highest part was about four or five feet above the ground. It was covered with a sheet iron hood, in the center of which there was an opening about 18 inches across. It revolved so rapidly that its blades were invisible. It made a buzzing noise and created a strong suction. The place was considerably frequented by children, some of whom were employed at the factory, and some of whom attended a school near by. They would sometimes stand and listen to the noise made by the fan. They were not forbidden to play there, and were not warned of any danger. There was no rail or barrier about the fan at the time of the injury, but a fence was built around it shortly afterward. Stinson Smith voluntarily placed his hand in the fan. He said immediately after being hurt that he had been seeing where the wind came from. Under these circumstances the jury were obviously justified in finding that the defendant could have reasonably anticipated such an accident, and was negligent in failing to take reasonable precautions against it. The Kansas cases on the subject are collected in *Kansas City v. Siese*, 71 Kan. 283, 80 Pac. 626, and *Price v. Atchison Water Co.*, 58 Kan. 551, 3 Am. Neg. Rep. 392, 50 Pac. 450, 62 Am. St. Rep. 625. In this view of the matter, it is immaterial whether the injury

occurred in the course of the duties of the deceased under his employment, inasmuch as if he had not been an employee at all, the defendant's liability would have been the same; the protection of the "turntable" doctrine being extended even to trespassers.

The defendant maintains that the plaintiff was guilty of contributory negligence, in that he consented to his son's employment in the factory, thereby violating the statute (Gen. St. 1909, § 7736) requiring parents of children between eight and fifteen years of age to send them to school. The connection is too remote. The fact that the deceased was not at school was not the proximate cause of his injury. It, at most, merely produced a condition that made the accident possible. 29 Cyc. 529; 7 A. & E. Encycl. of L. 382. The defendant's argument is substantially the same as that upon which a few courts have held that a passenger traveling upon Sundays in violation of the law cannot recover for an injury resulting from the negligence of the carrier. That argument has already been repudiated in this State (*City of Kansas City v. Orr*. 62 Kan. 61, 66, 8 Am. Neg. Rep. 36, 61 Pac. 61, 50 L. R. A. 783) as well as in most others where it has been considered, (27 A. & E. Encycl. of L. 411; 2 L. R. A. 521, note). The plaintiff's consent to his son's employment did not involve the assumption of any risk resulting from the company's negligence. 29 Cyc. 1640.

The defendant complains that, notwithstanding two uncontradicted witnesses testified that Stinson Smith had been warned to keep away from the fan, a special finding was made to the contrary. The question of the credibility of the testimony, however, was for the jury, and the trial court.

The judgment is affirmed. All the Justices concurring.

HUTCHINSON v. CAPITAL TRACTION CO.

[COURT OF APPEALS OF DISTRICT OF COLUMBIA, JANUARY 3, 1911.]

36 App. D. C. 251.

Carriers—Conductor—Duty to Warn Passenger.

It is not the duty of a street car conductor to warn a passenger, who erroneously believed that the car had come to a stop, not to leave it while in motion, where there is nothing in the passenger's appearance to denote helplessness or of his apparent intention to leave the car.

Appeal by plaintiff from a judgment of the Supreme Court of the District of Columbia based upon a verdict rendered in favor of defendant, in an action brought by William H. Hutchinson to recover damages for personal injuries caused by being thrown from a street car. Affirmed.

For appellant—Leonard J. Mather.

For appellee—R. Ross, R. Ross Perry, G. Thomas Dunlop.

STATEMENT OF FACTS: This is an appeal from a judgment for defendant, the Capital Traction Company, in an action for personal injuries received by a passenger of the street railway company.

The declaration alleges that plaintiff, William H. Hutchinson, was a passenger on defendant's car on the 14th street line on March 29th, 1908; that it was the duty of defendant to carry him safely, and to allow him safely to leave the car at his destination; that when the car going south reached its regular stopping place near the corner of 15th and G streets, plaintiff, in the exercise of due care, sought to alight therefrom, and was violently thrown to the ground through the negligence of defendant's agents, and by reason thereof sustained serious and permanent injuries.

The evidence of plaintiff, testifying on his own behalf, tended to show that he had taken dinner with his daughter near the north end of the 14th street line, and gotten on the car about 8:30 P. M. on his

NOTE.

On the subject of **Liability for Injuries to Persons Alighting from Street Cars and Trains**, see note in 21 Am. Neg. Rep. 604.

And on the general subject of **Alighting from and Boarding Street Cars and Trains**, see Vols. 2-7 Am. Neg. Cas., where the cases from the earliest period

to 1896, in all the States and Territories and the Federal and Supreme Courts of the United States are reported, and classified and arranged in alphabetical order of States, and for subsequent cases to date. See Vols. 1-21 Am. Neg. Rep., and this volume (1 N. C. C. A.) and succeeding volumes of Negligence and Compensation Cases Annotated.

way home, at 17th street and Pennsylvania avenue, intending to transfer to the avenue car west at 15th and G streets. Plaintiff was eighty-three years old, but healthy and active, and accustomed to riding on the cars alone and without assistance. He obtained a transfer ticket before reaching the transfer station. He made no effort to rise until sure the car had stopped. Slowly passed down the front car, passing the conductor about the center of the same. Saw the motorman looking back through the front window. He saw the west bound train coming up, and started to it, but found a barrier. Wheeled about on the platform, went toward the exit, and looked in the car again. Saw the conductor and motorman in the same positions. Moved forward two steps, holding the stanchion, and stepped with his right foot on the step below. Had his left foot lifted in the air, and, quicker than a flash, was lying down under the edge of the car, alongside the moving wheel. The conductor could not miss seeing him. Made no effort to rise from his seat in the car until positively sure it had stopped. Walked slowly to the platform. There was no motion of the car until he was pulled over in a flash. The car started quick as a flash.

A written statement was read to him as signed by him, in which he said that he found the car had started while he was getting on the step. The car came to a stop within 2 feet. He said that he was recovering from unconsciousness when he signed it, with a room full of men, and it was not correct. He said that the car started as he was going down the last step.

Testimony on behalf of the defendant, consisting of the conductor and motorman, two passengers, and a man at the crossing, tended to show that the car was slowly coming to a stop at the regular stopping place when plaintiff got up and went on the platform. That it came to its stop from 12 to 18 inches from place where plaintiff stepped off. That it did not stop before that and start again. Testimony tended to show that immediately after the accident plaintiff said it was due to his own fault. The conductor testified that he was on the platform of the trailer when plaintiff undertook to step off. Observed no weakness about him. Did not warn him not to get off the car before the car stopped, as he had no reason to suspect that he contemplated doing so. There was nothing unusual in his appearance or conduct to attract special attention to him.

The court refused three special instructions asked by plaintiff, and gave one relating to the evidence concerning the statement signed by him.

At the request of defendant the jury were charged that the burden of proof was on plaintiff to show that defendant's car came to a stop

and that while plaintiff was endeavoring to alight therefrom it started and caused his fall. This was excepted to. The court then gave a charge to the jury, to a part of which only plaintiff excepted. The objection to that part was that it eliminates as a factor in the case whatever of negligence the jury might find on the part of the defendant in not stopping, or saying anything to plaintiff as he was about to alight from the car. The jury returned a verdict for the defendant, and judgment was entered thereon after motion for a new trial had been denied.

SHEPARD, C. J. On the argument the appellant rested his case on the exception last noted above.

Upon the assumption that the plaintiff believed that the car had come to a stop, the contention is that it was the duty of the conductor to apprehend his intention to get off while the car was still in motion, and to warn him, or otherwise prevent his doing so.

In our opinion, this, under the circumstances of the case, extends the duty and liability of the carrier to an unreasonable extent, for which no precedent has been found.

It is a matter of common observation that many passengers leave their seats when a car is coming to a stopping place, and start to the door and platform with a view to getting out at the earliest possible moment; sometimes standing upon the step for that purpose.

Unless there be something in the appearance and conduct of the passenger, under such circumstances, reasonably calculated to give the conductor notice of the helplessness of the passenger and his apparent intention to leave the car before it shall have stopped, it would be unreasonable to expect him to stand at the door, and by word and act restrain the impatience of the passenger.

The conductor who, himself, knows that the car has not come to its expected stop cannot be expected to reasonably apprehend that a passenger firmly believes it has actually stopped, unless some special circumstances occur to indicate the fact.

It would be a very dangerous doctrine to permit a passenger, who is willing to testify to his belief, to impose upon the conductor the duty of correcting his mistake under ordinary circumstances, or in default thereof to render his employer liable in damages for any injury sustained.

A passenger in the possession of his faculties ought to know as well as anyone else when the car is moving, and when he undertakes to alight from it before it stops he takes the risk of injury, and must bear the consequences.

There was no error in the trial of the case, and the judgment will be affirmed. with costs. Affirmed.

DETTERING v. LEVY et al.

[COURT OF APPEALS OF MARYLAND, JANUARY 10, 1911.]

114 Md. 273.

1. Master and Servant—Safe Place—Master's Knowledge.

A master is presumed to know the dangers connected with the place provided for his servants' work.

2. Master and Servant—Unguarded Shaft—Danger—Injury.

In determining whether the location of an unguarded revolving shaft which furnishes power to operate sewing machines, is dangerous, so that a master may be charged with negligence in failing to guard it, the question is whether the operatives of the machines are likely to come into such close contact in the discharge of their duties as to place them in danger of injury.

3. Master and Servant—Safe Place—Question for Jury.

The question whether an employer is negligent in failing to protect a shaft, furnishing power to operate sewing machines, and located beneath the table 23 inches from its edge and 8 inches from the floor, is a question for the jury.

4. Master and Servant—Unprotected Shaft—Assumed Risk.

A sewing machine operator, looking beneath the table for a lost needle wrench, does not, as matter of law, assume the risk of injury from having her hair caught on an unprotected smooth shaft at least 10 inches away.

5. Master and Servant—Unprotected Shaft—Contributory Negligence.

A sewing machine operator, whose hair was caught on an unprotected shaft located at a distance of 10 inches from her head, as she was looking beneath the table of her machine for a lost needle wrench, is not guilty of contributory negligence, as matter of law, because she did not borrow a wrench from another operator or look for the lost wrench in a different manner.

6. Master and Servant—Injury on Unguarded Shaft—Assumption of Risk—Evidence.

In an action to recover damages for personal injuries caused by the hair of the operator of a power sewing machine being caught on an unguarded revolving shaft as she was looking beneath her table to find a lost wrench, it is competent to show whether the drawing forces of the shaft, as shown by experts, were of a character generally known to untrained persons, as bearing on the question of assumed risk.

Appeal by plaintiff, Matilda Dettering, from a judgment of the Baltimore City Court, rendered in favor of defendants in an action

NOTE.

On the subject of Liability of a Master for an Injury to his Servant

Caused by the Latter's Clothing Catching on a Set-screw, see note in 16 Am. Neg. Rep. 401.

brought to recover damages for personal injuries sustained by plaintiff, who was an employee of defendants, caused by her hair becoming caught on a revolving shaft. Reversed.

For appellant—Clarence A. Tucker, and Joseph N. Ulman.

For respondents—Vernon Cook, and Chas. Markell.

DECLARATION.

First count. 1. For that the defendants maintain and operate for their own uses and purposes a plant in Baltimore City, wherein they employ a number of servants, among whom at and before the time of the happening of the wrongs and grievances herein complained of, was the plaintiff, who was employed by the defendants as a sewing machine operator; that thereupon it became and was the duty of the defendants to furnish and provide the plaintiff with a reasonably safe and proper place in which to do and perform the work required of her, and not to expose her to unnecessary risk or danger while so employed; that in neglect and default of their said duty in the premises the said defendants did not furnish and provide the plaintiff with a reasonably safe and proper place in which to do and perform the work required of her, and did expose her to unnecessary risk or danger while so employed, in that they assigned her to work upon a sewing machine run by power, the said power being supplied through a line of revolving shafting elevated a short distance from the floor and located below and extending along a line near the center of a row of tables, about three or four feet wide at the top, upon one of which tables said machine was placed; that said shafting was unprotected by any guard or shield, so that heretofore, to wit, on or about the 12th day of November, 1908, while the plaintiff was in the act of prudently and carefully working on and about said machine, and in the exercise of due and ordinary care she stooped to pick up a needle wrench which had dropped upon the floor under said table from the machine at which she was working, and in the act of so doing the suction caused

And on the subject of Liability of a Master for an Accident to his Servant Caused by Machinery, see note in 10 Am. Neg. Rep. 301.

And on the subject of the Duty of a Master to Furnish a Safe Place to Work, see note in 12 Am. Neg. Rep. 251.

And on these subjects generally, see

the "Master and Servant Cases" in Vols. 13-16 Am. Neg. Cas., and the numerous notes therein, where the decisions in the several States and Territories and the Federal and Supreme Courts of the United States rendered from the earliest period to 1896 are reported and classified and arranged in alphabetical order of States.

by the rapid revolution of said shafting drew her hair against said shafting so that it was caught and wrapped around same, and the scalp of the plaintiff was completely torn off from her head, whereby the plaintiff has suffered great physical pain and mental anxiety, and has been disqualified from prosecuting any avocation, and has been required to employ a physician and purchase medicines at great cost and expense, has lost the emoluments she otherwise would have received from her labor, and is otherwise injured and damaged.

And the plaintiff says that her said injuries were directly caused by the negligence and want of care of the defendants in the premises, and without negligence or want of care on the part of the plaintiff directly contributing thereto.

Second count. 2. And for a second count the plaintiff says that the defendants maintain and operate for their own uses and purposes a plant in Baltimore City wherein they employ a number of servants, among whom at and before the time of the happening of the wrongs and grievances hereinafter complained of, was the plaintiff, who was employed by the defendants as a sewing machine operator; that thereupon it became and was the duty of the defendants to furnish and provide the plaintiff with a reasonably safe and proper place in which to do and perform the work required of her, and not to expose her to unnecessary risk or danger while so employed, and to warn her of any hidden danger not appreciable by the ordinary untrained observer, to which in the performance of her duties she might be subjected; that in neglect and default of their said duties in the premises said defendants did not furnish and provide the plaintiff with a reasonably safe and proper place in which to do and perform the work required of her and did expose her to unnecessary risk or danger while so employed and failed to warn her of the hidden dangers not appreciable by the ordinary untrained observer to which in the performance of her duties she was liable to be subjected, in that they assigned her to work upon a sewing machine run by power, the said power being supplied through a line of shafting elevated a short distance from the floor and located below and extending along a line near the center of a row of tables upon one of which said tables said sewing machine was placed, that said shafting revolved with great rapidity, and in so doing created a vacuum into which every light substance coming near said shafting was liable to be drawn; that this drawing power of a rapidly revolving shafting is a hidden danger not appreciated by the ordinary untrained observer, and was unknown and could not by the exercise of ordinary care have been known to the plaintiff, so that the plaintiff without having had any notice or

warning of this danger while in the performance of her duties as aforesaid, and in the exercise of ordinary care, on or about the 12th day of November, 1908, stooped to pick up a needle wrench which had dropped from the table to the floor, and in the act of so doing the suction as aforesaid, caused by the said rapid revolution of said shafting drew her hair into this vacuum, and her said hair was caught and wrapped around said shafting, and the scalp of the plaintiff was completely torn from her head, whereby the plaintiff has suffered great physical pain and mental anxiety, has been disqualified from prosecuting any avocation, has been required to employ a physician and purchase medicines at great cost and expense, has lost the emoluments she otherwise would have received from her labor, and is otherwise injured and damaged.

And the plaintiff says that her said injuries were directly caused by the negligence and want of care of the defendants in the premises, and without negligence or want of care of the plaintiff directly thereunto contributing.

And the plaintiff claims \$20,000.

PLEA.

The defendants, by Gans & Haman, their attorneys, say for a plea to the plaintiff's declaration that they did not commit the wrongs therein alleged.

BOYD, C. J. The appellees conduct a factory in the city of Baltimore for the purpose of manufacturing straw hats, and the appellant was employed by them, and had been for 14 years prior to the accident complained of, as a sewing machine operator. In the room in which she worked there were 8 rows of tables which were 50 feet long, 46 inches wide, and 2 feet 6 inches high. There are on each table 34 sewing machines which are located on the two sides of the table, 40 inches apart, and almost directly opposite each other. They are driven by power supplied by shafting from below, which is 13-16 inches in diameter and revolves at the rate of 450 revolutions per minute. It runs the length of the table, directly to the center, 8 inches from the floor. There are on the shaft pulleys or collections of wheels consisting of a disc wheel 12 inches in diameter, clamped permanently to the shaft and revolving with it, a leather friction wheel 5 inches in diameter, which runs against the disc wheel when the sewing machine is in operation, and back of the leather friction wheel there is a grooved wheel 7 inches in diameter which has 6 spokes and carries a one-quarter inch leather belt, which connects with the sew-

ing machine on the table. There is a treadle which the operator presses on to start her machine, thereby bringing the leather friction wheel in contact with the disc wheel. When the machine is not in use, the leather belt is not in motion; but the pulley or disc wheel on the main shaft is always in motion when the shaft is. The treadle is 12 or 14 inches long. Each operator has at her place a needle wrench, which is used in changing the machine needle when the character of the work to be done is changed, and also a screw-driver, an oil can, and a measure, which are kept in the machine drawer each one has. On November 12, 1908, the appellant wanted to change to coarse work and had to change her needle. She could not find her needle wrench and got down on the floor to look for it, and, not finding it, got up again and looked in her machine drawer. She then got down again; was on her hands and knees and was looking under the treadle. The front edge of the treadle is directly under the front edge of the table. As she looked for the needle wrench, her hair caught on the shaft, and her entire scalp was torn off. The testimony tends to show that her hair caught on the smooth shafting about 18 inches from the pulleys connecting it with her machine and 22 inches from the pulleys connecting the shaft with the machine on the opposite side of the table. The shafting was not covered or in any way protected between the two pulleys, a distance of 40 inches.

During the trial ten exceptions were taken to rulings on the evidence, and the eleventh was to the ruling of the court in granting the defendant's second prayer offered at the conclusion of the plaintiff's testimony. The defendants offered a prayer asking the court to instruct the jury that from the uncontradicted evidence the plaintiff by her own negligence directly contributed to the happening of the injuries, and therefore their verdict must be for the defendants, and a second prayer that the plaintiff had offered no evidence legally sufficient to show any neglect on the part of the defendant as to any duty owing by them to the plaintiff, which in any way contributed to the happening of the injuries, and therefore their verdict must be in favor of the defendants. The court granted the second prayer, but did not act upon the first, and a verdict was accordingly rendered for the defendants, on which a judgment was entered, and this appeal was taken.

We will first consider the eleventh exception, and in that connection will refer to some of the others, which have relation to it. We are not prepared to say that there was no evidence legally sufficient to show any neglect on the part of the defendants as to any duty owing by them to the plaintiff which in any way contributed to the happen-

ing of the injuries for which this suit was brought. The plaintiff was one of a large number of women and girls who were employed at the factory as sewing machine operators, and there were 34 women and girls at the table where the plaintiff was, under which the uncovered shafting was rapidly revolving. As it was less than 23 inches from the edge of the table and only 8 inches from the floor, it must have been near the skirts of the operatives when sitting in the position necessary to use the treadles—at least sufficiently near to make it dangerous if the skirt of one of them was moved 8 or 10 inches toward the shaft. The testimony shows that the skirts of some of them had at different times been caught and torn off, and at least one of the operatives was seriously injured; in the language of the plaintiff, "It made a wreck out of her." Perhaps there was but little danger, if any, if the operatives always remained in the position they usually occupied; but even then a current of air might carry a skirt made of light fabric the short distance necessary to reach the shaft, a fright or some sudden movement might cause an operative to unconsciously throw her feet forward a few inches, not to speak of the fact that a fatigued girl or any one with her mind on her work might thoughtlessly stretch her weary limbs beyond the safety point and her skirt be caught. Or if it be true, as the evidence shows, that the small tools used by the girls were constantly being jarred off the table from the motion of the machinery, the operatives were liable to get into positions attended with danger from a rapidly revolving shaft situated as this was. It will not do to say that, if all of them always used due care, there was no danger when engaged at their work, for, even if that be conceded, we know by experience and observation that there is no human being who always and under all conditions will do what they would ordinarily do if they remembered they were near dangerous places or articles.

It would therefore seem that when an employer, who is under legal obligation to furnish his employees with a reasonably safe place to work in, prepares such place for women and girls, all of whom cannot be experienced, he ought to provide against such dangers as we have spoken of, if it can be reasonably done, and he has reason to believe that they do actually exist. In this instance the defendants were not only presumed to know what might happen, but they knew before the plaintiff was injured that a number of times there were accidents by reason of this unprotected shafting. There is nothing in the testimony to show that it would be impracticable to cover the shafting between the pulleys, and there is nothing to show that it is not customary to protect it when situated as this is. In the absence of some

good reason for not covering it, it does not seem to be so unreasonable or so unnecessary for the protection of the operatives to require it, as to authorize the court to declare, as a matter of law, that the defendants were not negligent in failing to do so. Ordinary men can at least differ as to that. A rapidly revolving shaft is undoubtedly likely to do injury if one comes in contact with it, and whether the location of such a shaft, when unguarded, is dangerous, may depend on a variety of circumstances.

The most important inquiry in determining that question is: Are the operatives while in the discharge of their duties likely to come in such close contact with it as to produce injury? It was not pretended in *Gleason v. Suskin*, 110 Md. 137, 72 Atl. 1034, that it was not negligence on the part of the defendants to leave the piece of the shaft which caused that injury, unprotected. On the contrary, recovery was denied the plaintiff in that case on the ground that she was guilty of contributory negligence, which presupposes negligence on the part of the defendant.

In the only other case of a suit for damages sustained by reason of injuries caused by uncovered revolving shafting in this State (*American Tobacco Co. v. Strickling*, 88 Md. 500, 41 Atl. 1083, 69 L. R. A. 909), we said: "Of course, it would not be necessary under all circumstances to cover shafting. It may be so situated as to be safe and at least beyond the reach of inexperienced persons, but when shafting is so easily protected, as described by some of the witnesses, and when it is so situated that those inexperienced with its danger may be brought in contact with it in the discharge of their duties, there can be no reason why, in a case of this kind, the question whether the owner of the factory was guilty of the want of ordinary care, and whether it was an accident likely to occur, should not be submitted to the jury." It is true that in that case the plaintiff was a girl 17 years of age, who was inexperienced in machinery and had never been warned of the danger; but in this case the plaintiff testified that she had never been warned of such danger as she encountered, and that she did not know that there was such danger. We will refer to that branch of the case more particularly under another head; but there is certainly testimony tending to show that there was danger from this shaft, located as it was, and such as one even of the plaintiff's experience might not be aware.

As shown by the fourth and sixth bills of exception, the plaintiff attempted to prove that it was practicable to cover the shafting, and what the general custom was; but the court refused to permit the questions to be answered. In our judgment there was error in both

of those rulings; but there was enough in the record even without that testimony to prevent the court from taking the question from the jury. Why shafting 8 inches from the floor, having a smooth surface for 40 inches between the sets of pulleys, could not easily and readily be covered, is not shown, and it is difficult to assign any reason other than the expense why it was not. If there was, then it should be given. One of the defendants, who was called as a witness for the plaintiff, volunteered the statement that the pulleys could not be boxed in; but he did not say or suggest that the shafting could not be covered. Yet one of the experts said the most dangerous part of the machinery was on the shaft, by reason of the opposing forces from the two pulleys concentrating their action toward it at about midway between the two pulleys.

In *Gleason v. Suskin*, *supra* [110 Md. 137, 72 Atl. 1034], sewing machines were run as they were at the Levy factory; there was a shafting under the center of the table, eight inches from the floor, of about the diameter of that in this case. It was there shown that "this shafting was boxed for the safety of the employees in order to prevent their skirts and clothing from catching in it." The part of it which caused the injury to that plaintiff had been uncovered for the purpose of making an extension to connect with another machine. While we cannot use the evidence in that case to show negligence on the part of these defendants, it does show that we are at least not dealing with impossibilities when we say that such a question should be submitted to the jury.

We do not mean to say that it is always negligence *per se* to leave shafting uncovered; but we do say that it was, under all the circumstances of this case a question for the jury. Of the cases cited by the appellees those chiefly relied on are *Nelson-Bethel Clothing Co. v. Pitts*, 131 Ky. 65, 114 S. W. 331, 23 L. R. A. (N. S.) 1013, and *Daniels v. New England Cotton Yarn Co.*, 188 Mass. 260, 74 N. E. 332. In the former the shafting was arranged very much as it was in this instance; but no such question seems to have been raised, as we have here, whether there was negligence in not covering the shaft. There the belt which was used to operate the machine was alleged to be defective. The plaintiff recovered a verdict in the lower court, and, as stated in the opinion: "The ground upon which the recovery was had was that the belt of the machine was not reasonably safe for use; that its defective and unsafe condition was known to the defendant, and unknown to her; and that she was assured that the belt was reasonably safe, and suitable for use, and used it not realizing that its condition was dangerous, relying upon the statements of Begley, the dangerous

condition of the belt not being so manifest that a person of ordinary prudence would not have used it." Begley was the person whose duty it was, as claimed by the plaintiff, to fix the belts. The court pointed out the fact that she knew as much about belts as Begley did, that she had often put them on, and had put the one in question on seven times the morning she was hurt, and added, "She understood that it was a part of her duty, and that she was hurt in putting it on was an accident which none of the parties anticipated, or had any reason to anticipate." The opinion concluded by saying that, "under all the evidence, the court should have instructed the jury peremptorily to find for the defendant;" but there is no reference to any negligence by reason of the shaft not being covered, and, as we have seen, the plaintiff's theory was that the defective belt was the cause of the injury. There was some evidence that the plaintiff's hair was not put up, and that the forelady had called her attention to her hair being down and directed her to tie it up, which she had agreed to do, but had not in fact done it, and that that was the cause of her hair being caught. She claimed that her hair was caught in one of the hooks on the belt; but, without further discussing that case, it is sufficient to say that apparently the question we are now considering was not presented or passed on by that court.

In the Daniels Case, *supra*, the plaintiff wore a braid which came down to the middle of her back. The court said: "The accident in this case evidently was caused by the plaintiff rising up from a stooping position in too close proximity to the twister. By so doing her hair was caught." The "twister" was one of the machines in use. The contention was that the plaintiff should have been warned of the danger of wearing her hair down; but the court said that there were two answers to that: In the first place, the defendant had posted notices in different parts of the room in which the plaintiff worked warning the employees against wearing loose sacks, loose or flowing sleeves, "or wearing their hair flowing or in hanging braids or in long curls." And the plaintiff admitted that she had read part of the notice. The court held that posting the notices was all that was required of the employer, and he was not required to call the attention of each operative to the notices. Then it was said that there was no reason for instructing the plaintiff in regard to the danger of getting her clothes or hair against the machine or rollers, if she knew the danger, which she did. It was not shown in either of those cases that the shafting or machines could reasonably be required to be covered, and there was no point made as to the negligence of the defendants in not doing so.

Of course it is not necessary in all cases to cover shafting, and oftentimes it could not reasonably be required; but where, as in this case, it apparently can be readily done, and experience with the particular shafting had shown that it was dangerous if left uncovered, we are not willing to announce as the law of this State that an employer does not owe his employees the duty of covering shafting so situated, where girls and women are, in the performance of their work, necessarily brought in such close proximity to it that they may be injured, if they happen to get a few inches closer to it than their work ordinarily requires. There may be cases where it would be unreasonable to require it, or where no danger can be reasonably anticipated from it being left exposed; but to expect women and girls to give proper attention to their work, and at the same time have their minds constantly on the shafting, which is so near their feet that any unusual movement by them of a few inches may result in their skirts being caught and themselves being injured, is, to say the least, demanding more care and prudence of such operatives than can ordinarily be expected. It is true that the shafting is in one sense protected by the table; but it is equally true that the mere fact that it is out of sight and to some extent must be out of mind of the operative who has her thoughts on her work, increases the danger, and, if it is practicable to cover the greater part of the space between the pulleys, it is not unreasonable to so require of the employer, one of whose important duties is to provide his employees with a reasonably safe place to work in.

In this connection we will consider the question of assumed risk relied on by the appellees. As was said in *Balt. & O. R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, which this court has several times quoted with approval: "It is the master who is to provide the place and the tools and machinery, and when he employs one to enter into his service he impliedly says to him that there is no danger in the place, the tools, and machinery than such as is obvious and necessary." In *Wood v. Heiges*, 83 Md. 268, 15 Am. Neg. Cas. 391, 34 Atl. 874, after speaking of the risk which the servant assumes, when he enters the employ of a master, it is said: "Where, however, the risks to which the servant is subjected are such as he had no reason to believe, from the nature of his employment, he would have to encounter, and such risks arise from causes hidden or secret, or such as would reasonably escape his observation, the master is bound to notify his servant, provided he himself knew or by the exercise of ordinary care ought to have known of them." Again, it was said in *Eckhardt v. Lazaretto Co.*, 90 Md. 188, 44 Atl. 1018, that: "When

the occupation carried on is in its nature so extrahazardous as to be dangerous to human life or health, both justice and humanity require that the employer should take all reasonable and needed precautions to secure safety to the employees, and make clearly known to them the inherent dangers of the service, and should especially acquaint them with such risks as are ascertainable only through a knowledge of scientific facts, which an uneducated man is not presumed to know."

In *Yates v. McCullough Iron Co.*, 69 Md. 370, 15 Am. Neg. Cas. 404, 16 Atl. 280, this court, after speaking of the risks which the servant assumes, said: "It may be assumed that this rule applies only to patent or obvious defects, such as persons of ordinary care would be likely to discover, and that the servant is not bound to inspect the appliances to see whether or not there are latent defects that render their use more than ordinarily dangerous, but is only required to ascertain such defects or hazards as are obvious to the senses. 2 Wood's Master & Servant (2d Ed.) § 376. Hence, in cases where knowledge of the defects does not necessarily carry with it knowledge of the resulting danger, it may be proper for the court to instruct the jury as requested in the plaintiff's second prayer." That prayer asked the court to instruct the jury that if they found that the machinery in question was, owing to some defect in it or in the building in which it was placed, unsafe and dangerous, by reason of the negligence of the defendant, "then, in order to establish that the plaintiff assumed the risks involved in using it, it is not sufficient to show that the machinery was defective, and that such defect was known to the plaintiff, but it must appear that the danger was known to him as well as the defect which caused the danger, or that by reasonable care on his part it would have been known to him."

Now, without quoting further from other cases, let us apply the doctrine to be found in these decisions to the facts in this case. It may be admitted that, owing to the age and experience of the plaintiff, she would be held to assume such risks as were the result of coming in contact with the shafting, if she had been injured by her clothing being caught in the shafting while she was engaged in her work, or if she had touched it with her head or hair, or had gotten so close to it that she would be presumed to know it would attract her hair and injure her; but she denied positively that she had knowledge of such powers of attraction as was proven in this case to exist, if the plaintiff's testimony is correct. She said: "I knew it was dangerous to touch it; but I did not think for a minute that it was dangerous when you were away from it, that it would get you like it got me." She was also asked, "How close did you think you could

come to it with safety?" and replied, "I never considered that at all." According to her testimony, she did not place her head closer to the shaft than something like 10 inches. It cannot be said to be a matter of common knowledge that shafting such as this could attract human hair, or other light substance, such a distance as was testified to by the experts in this case. Indeed, it would likely be questioned by those presumably much better informed on such subjects than the plaintiff, in the absence at least of testimony of those of scientific knowledge equal to that of the experts who testified. But the experts were positive as to the effects of the force spoken of, and the plaintiff was equally positive as to the distance she was from the shaft.

Assuming their testimony to be true, as we must as the case is presented, can it be possible that the law has so little regard for the thousands and tens of thousands of employees whose lives, limbs, and health are in a large measure dependent upon the proper discharge of the duties which their employers owe them, as to declare that, although the master is negligent, the servant cannot hold him responsible for injury sustained by reason of that negligence, because the servant has assumed risks which he never dreamed existed? A servant may know his master is sick and may attend him believing he has chickenpox. If in point of fact he has smallpox, and the master knew he had, does the servant assume all risks from smallpox because he knew the master was sick? A servant may enter the service of a master in some excavation which he knew was dangerous by reason of obvious conditions, but does he assume the risk of being blown up by dynamite which the master knows had been left in the place to be excavated, although the servant did not know it or have any reason to suspect it? And in this case the servant knew that the unprotected shaft was dangerous if she touched it; but she did not know, according to her testimony, that the pulleys and shafting had the power of attracting hair and other light substances ten or more inches. It is possible that the defendants did not know the extent to which the powers spoken of might be exerted; but, if they did not, they should at least be required to explain that they did not and why they did not. They had the shafting put in position, and they ought either to know all dangers which could reasonably be anticipated as the result of it being left unprotected, or give some satisfactory reason for not knowing them. But if they did not know or could not be expected to have known that there was danger of such injury being done as the plaintiff suffered, surely she cannot be said to have assumed such risk, for there is nothing to suggest that she knew more than they did.

The doctrine of assumed risk, while well established in this State, is

one that ought not to be extended so far as to relieve an employer of his negligence on the theory that, because the employee knew there was danger, if she came in contact with a part of the machinery which made it so, she assumed all risks from it, even if she kept away from it a distance which she supposed and had the right to suppose, in the absence of some warning, was perfectly safe. The doctrine is sought to be applied so as to excuse negligence in this case, for, if there was no negligence on the part of the appellees, there is no occasion to rely on the doctrine of assumed risk, and hence we say that it should be limited to risks which are obvious, and can be understood by an employee of ordinary intelligence, or at most to those which should be anticipated by the employee, as the result of conditions which are obvious, or can reasonably be expected to be known by him.

Nor do we think the evidence shows such contributory negligence on the part of the appellant as to justify us in saying, as a matter of law, that she cannot for that reason recover. It may be true, as suggested by the appellees, that she actually touched the shafting; but that is not what she swore to, and, according to her expert testimony, her hair might have been drawn to the shafting, even if it were farther from it than she says she was. It may be that she could have borrowed a needle wrench from another operative, or could have run a stick under the treadle, to see if the wrench was there; but if she had no reason to fear any danger, from doing what she did, it cannot be said she was guilty of contributory negligence because she did not adopt one of those plans. She needed the wrench in her work, and, according to her testimony, was responsible to the appellees for it if she lost it.

This case differs materially from that of *Gleason v. Suskin*, *supra* [110 Md. 137, 72 Atl. 1034]. That appellant was perfectly aware of the danger of the shafting, and of coming in contact with it, which she evidently did, but she took a position in a narrow space about 35 by 16½ inches, turned her back towards the shafting, and without any reason placed herself very near it, although she knew it to be dangerous if her dress came in contact with it. The expert testimony showed that her dress must have been as near as one-half inch to the shafting, otherwise the accident could not have occurred, according to those witnesses, unless her dress was frayed, of which there was no evidence. The testimony failed to show that it was either necessary or even more convenient for her to take the position she did. Under these circumstances, it was a clear case of contributory negligence; but here, according to the evidence, the conditions were altogether different.

We are of the opinion therefore that the case presented by the record was one which should have been submitted to the jury by appropriate instructions as to the negligence of the defendants (whether or not leaving the shafting unguarded was negligence), as to the assumed risks of the plaintiff and as to her contributory negligence.

We find no reversible error in the first and second exceptions, as such questions could have done no possible harm. There was no error in the ruling in the third bill of exceptions.

In answer to the question as to what extent the pulleys were boxed, the witness said they were not boxed in; "you could not box them in." That was a very natural answer, if such was the fact, and the plaintiff had no cause to complain of it. We have already said that there was error in refusing to allow the questions in the fourth and sixth bills of exception to be answered. There was no error in striking out the testimony objected to in the fifth.

The witness was not familiar with factories such as that of the appellees in Baltimore; but the question was limited to those in that city. We think the questions in the seventh, eighth, ninth, and tenth bills of exception were admissible.

It was proper to prove whether the forces and effects spoken of by the experts were of a character generally known to untrained persons, as reflecting upon the questions of assumed risk and contributory negligence.

For errors in granting the second prayer of the defendants, and in the rulings in the fourth, sixth, seventh, eighth, ninth, and tenth bills of exception, the judgment must be reversed.

Judgment reversed, and new trial awarded; the appellees to pay the costs above and below.

PARKER v. W. C. WOOD LUMBER CO.

[SUPREME COURT OF MISSISSIPPI, FEBRUARY 13, 1911.]

98 Miss. 750.

1. Master and Servant—Simple Tools—Inspection.

A cant hook is not a "simple tool" within the meaning of the doctrine relieving the master from the duty of inspecting such tools for obvious defects.

2. Master and Servant—Contributory Negligence—Question for Jury.

The question whether a servant injured by falling while using a defective cant hook was guilty of contributory negligence in failing to discover the absence of a bolt fastening the cuff to the hook, is one for the jury.

Appeal by plaintiff from a judgment of the Circuit Court of Covington County, rendered in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by the breaking of a cant hook used in the course of plaintiff's employment. Reversed.

For appellant—R. N. Miller.

For appellee—McIntosh Bros., and Flowers, Fletcher & Whitfield.

DECLARATION.

Ernest E. Parker, a citizen of Covington County, Mississippi, plaintiff in this case, complains of the W. C. Wood Lumber Company, a corporation duly incorporated under the laws of the State of Mississippi, domiciled and doing a saw-mill business at Collins, in Covington County, Mississippi, defendant herein, in an action of trespass for damages.

For that, on the 24th day of April, 1909, and a long time before that time, the defendant was doing a saw mill business, manufactur-

NOTE.

On the subject of the Duty of a Master to Inspect the Tools and Appliances Furnished to a Servant, see Vols. 13-16 Am. Neg. Cas., where the "Master and Servant Cases" from the earliest period to 1896 decided in the several States and Territories and the Federal and Supreme Courts of the

United States, are reported and classified and arranged in alphabetical order of States.

And for subsequent cases to date on the same subject, see Vols. 1-21 Am. Neg. Rep., and this volume (1 N. C. C. A.) and succeeding volumes of Negligence and Compensation Cases Annotated.

ing lumber and cutting and hauling the logs therefor in said County of Covington, and in said business it was using engines, locomotives and cars propelled by the dangerous agencies of steam and which locomotives and cars ran on tracks, railroad tracks, from the saw mill at Collins, Mississippi, to the woods a few miles away therefrom, hauling logs with such cars and engines over said tracks from the woods to its saw mill there to be sawed into lumber.

That on the said 24th day of April, 1909, and before that time, the said plaintiff was employed as a laborer by the said defendant company at wages of \$1.50 per day for his work; and he was placed by the defendant at work behind a part of the saw mill machinery which is called a sizer, and his duty was, as prescribed by the defendant, to turn large pieces of timber from skids, on which it lay, onto the bed or platform of the sizer, and that these skids were about four feet high from the floor, and the bed or platform of the sizer was also about four feet from the floor, and, as aforesaid, it was the duty of the plaintiff to turn these large pieces of timber over from the skids onto the bed or platform of the sizer where they would be carried in and through the sizer into an exact standard and uniform size for the market. The large pieces he was thus required to put in the sizer from the skids were perhaps 14x18 inches face measure and about 16 feet long and were very heavy.

That in order to perform this work the plaintiff was furnished with what is called a "Cant Hook," which consisted of an implement which had a handle about four and a half or five feet long, and from two and a half to three inches in diameter, and onto this handle there is an iron cuff or sleeve which ought to fit tight near the end of the handle and be fastened thereon with nail or screw securely, and on to this iron cuff there was attached a long hook, and with this "Cant Hook" the timber had to be caught on the top side with the hook and it required a downward pressure on the handle of the "Cant Hook," to move the stick of timber and to turn it over, and it required the entire weight of the person on this handle of the "Cant Hook," with the hook thus fastened in the timber, to turn the timber over; with a good "Cant Hook," in good order, there was no danger in thus placing his weight on the handle and turning the piece of timber; and plaintiff charges, that this was the regular method of turning the timber prescribed by the defendant as aforesaid.

Plaintiff charges, that it was then and there the duty of the defendant to furnish him a good, sound "Cant Hook" and in safe and good order with which to perform said labor, but that in utter disregard of this duty the defendant negligently furnished plaintiff with a "Cant

Hook" which was defective, in this, as the defendant well knew, that the cuff or sleeve which held the "Cant Hook" on the handle had a hole through it in which a nail or screw was intended to be driven into the handle so as to hold the cuff or sleeve securely on the handle, and the "Cant Hook" thus furnished plaintiff was not fastened onto the handle by having a screw or nail put through the sleeve or cuff into the handle, as it should have had, but the cuff or sleeve was thus loosely placed on the handle; and, so it was, that in undertaking to use it, on the 24th day of April, as the plaintiff did, by fastening the hook on the top side of the 18 inch face of a piece of timber, and bearing down on the handle of the "Cant Hook" with his body and weight in an effort to turn the stick over, with all due care and caution for his safety, the said cuff or sleeve, which held the hook to the handle as aforesaid, slipped off, and thereby caused plaintiff to fall about four feet onto the floor, and his knee cap struck on a piece of board or timber, which was placed by the defendant under one of the legs to the bed or platform of the sizer, and broke his right knee all to pieces; broke and destroyed his knee cap and that point of the bone immediately below the knee, and he is advised that it will be necessary to amputate his leg, and it will have to be done, or at all events, it will be permanently injured, and the use of it destroyed forever.

The plaintiff says, that he did not know of these defects in the fastening of the sleeve of the cant hook onto the handle; and that in his use of it, at the time of the injury, he was acting with all due care for his own safety, and that negligence of the defendant in failing to furnish him with a safe and good "Cant Hook," in good and safe condition, was the cause of his injury; and that he has suffered great pain of mind and body therefrom, and will endure pain and suffering of body and of mind and humiliation of being disfigured and maimed for life; and by reason of this negligence of the defendant as aforesaid, and his consequent injury, that the defendant has become liable to him in damages in the sum of twenty-five thousand dollars.

Wherefore, he brings this suit and demands judgment for twenty-five thousand dollars and all costs of suit.

PLEA UNDER GENERAL ISSUE.

Now comes the defendant, by its attorneys, and for a plea in this behalf says that it is not guilty of the matters and things set forth in plaintiff's declaration, nor any part thereof, and of this it puts itself upon the country.

SPECIAL PLEA.

Comes the defendant by its attorneys and for a further special plea

in this behalf says the said plaintiff should not have and maintain his aforesaid action against it because it says that the plaintiff in his contract of employment assumed all the risks incident to the work which he undertook to do and the alleged injury to him resulted from one of the ordinary dangers attendant upon such work and if the implement was defective the plaintiff assumed the risk of using it in its defective condition, since he knew of the defects in it, if any there were, or by the exercise of reasonable care and attention he would have known of them and with such knowledge he used the said implement. And the manner of handling the said timber was adopted voluntarily by the plaintiff and he assumed the risk of all dangers incident to the handling of the said timber, in the manner selected by himself for himself.

And this defendant is ready to verify.

WHITEFIELD, C. It is earnestly insisted by the appellee, which obtained a peremptory instruction in the court below, after the evidence for the plaintiff was in, that the cant hook in question is a tool of so simple and common and ordinary use as that the servant had equal opportunity of ascertaining any defect in it with the master, and that consequently with respect to such simple tool, of such ordinary and common use, the rule requiring the master to inspect tools furnished the servant does not apply. For a full discussion of this doctrine, see Labatt on Master and Servant, vol. 1, §§ 405, 406, 407. From that discussion, it will be seen that this doctrine is said to be well settled in some jurisdictions; but it is also expressly laid down that it has no application in the case of such simple tool, except where the defect in the tool is obvious or patent

We call special attention to two extracts from that discussion, found at the close of § 407. It is there said: "As a matter of ultimate analysis, it will be found that the logical basis of the doctrine which thus places the master and the servant upon different footings in regard to imputed knowledge of risks is to be found in the fact that it is the special and appropriate function of the former to furnish and supervise the instrumentalities of his business, and the special and appropriate function of the servant to use those instrumentalities. The duty of making a reasonably careful examination of the instrumentalities is a natural and necessary incident of the former function, but not of the latter." "In the opinion of the present writer, the practice of comparing the master's and servant's means of knowledge has been productive of much confusion of thought, which is apt to operate to the servant's disadvantage, by imposing upon him too high a standard

of care. It would have been far preferable to refrain from importing into the discussions in this class of cases an element which is wholly unnecessary, inasmuch as the ultimate question, in every instance, must be, simply, whether a person who had the same natural and acquired capacities for observation, and had been placed in the same position as the servant, would have discovered the danger by exercise of ordinary care. The extent of the obligatory knowledge of the master under the given circumstances seems to be a wholly irrelevant consideration."

Again it is said in *Magee v. North Pacific Coast Ry. Co.*, 78 Cal. 430, 13 Am. Neg. Cas. 334, 21 Pac. 114, 12 Am. St. Rep. 69, that the true rule has been stated by Shearman & Redfield on Negligence (4th Ed.) § 217, as follows: "It has been often said that the master is not liable for defects in such things to a servant whose means of knowledge thereof were equal to those of the master. But this is an erroneous statement. The master has no right to assume that the servant will use such means of knowledge, because it is not part of the duty of the servant to inquire into the sufficiency of these things. The servant has a right to rely upon the master's duty so to inquire; and the servant may justly assume that all these things are fit and suitable for the use which he is directed to make of them. The true definition is that, when circumstances make it the duty of the servant to inquire, it is contributory negligence on his part not to inquire."

It is true Labatt criticises this to some extent, but in our opinion it states the rule logically and correctly. Even in the case of a simple tool, the question comes to this: Did the servant know of the defect in the tool, or ought he to have known of it by the use of ordinary care? The doctrine so called does not seem to us to be any new doctrine, properly considered, but merely a new application of the very old doctrine of contributory negligence. In the twentieth volume of the second edition of the Am. & Eng. Ency. of Law, at pages 82, 83, and 84, instances are cited from a large number of cases of tools not deemed simple within the meaning of this rule. In that list of cases are included "chairs, hame straps, hammers, hooks, kettles, ladders, mauls, poles, ropes," etc. Surely all these tools just mentioned are much more simple in their structure than the cant hook such as it is shown to be by the testimony in this case. After the most careful consideration, we are of the opinion that the cant hook in this case cannot be classed properly as one of these simple tools within the meaning of this doctrine.

This leaves open for consideration the single inquiry: Was the plaintiff guilty of contributory negligence, barring recovery in this

case? We have examined the testimony again and again on this point. It is true that in his direct examination Parker stated that to the best of his knowledge the cant hook by which he was injured was the same hook he had used the day before the injury; and he also said that he had worked with that hook some two or three months, and that he had worked for the mill something over a year, and at another saw mill in Montgomery county for two years, and that he had had considerable experience with cant hooks. But on cross-examination he said twice that he saw nothing wrong with the hook the day before, and that it was apparently a good hook, and finally he said he couldn't swear that he saw this identical hook a day or two before, and at last he said, when asked if it was the same hook, as far as he knew. he said, "Not that I know of." On the particular point, then, as to whether the hook with which he was injured was the same hook he had used the day before it cannot fairly be said that he admitted that it was the same hook, at least his testimony on this point is in great confusion.

As to the point that the defect, which defect consisted of the fact that there was no nail or bolt in the hole in the top of the cant hook, fastening the cuff rigidly to the cant hook, he said as to the point that the defect was patent and obvious, and could be seen at a glance by any one, when pressed, "Why I don't know, I couldn't say just by a mere glance;" that is, he could not say that he could see the defect at a mere glance. He did say that he supposed a man picking it up and looking for the hole could see it, but he did not suppose that a man just picking it up would. What he did was just simply to pick it up and use it. So far, therefore, as the testimony of the plaintiff himself is concerned, it cannot be said to be clearly established, either that the cant hook with which he was injured was the same one he had used the day before, or that the defect in it was so open and obvious that he could have seen the defect by a mere glance. It is true that Connor, another of plaintiff's witnesses, did say that the cant hook was in such a condition that it could be discovered by a mere glance at it; but this testimony, like the testimony of the plaintiff, was for the jury.

If, in this case, the defect in the cant hook was so obvious that the plaintiff did know of the defect, or by the use of ordinary care ought to have known of it, then he is precluded from recovery by his own contributory negligence. In determining whether he did know, or by the use of ordinary care ought to have known, of the defect, it is proper to look, not only to his testimony directly on that point, but to all the evidence showing the extent of the use he had made of this cant hook, and the extent of his familiarity with cant hooks just like

this one. But whether the evidence, all looked to and properly weighed, shows that he did not know, or by the use of ordinary care ought to have known, of the defect, is, we feel constrained to hold, under our decisions, a question of fact for the jury. Therefore we are of the opinion that, on the testimony in this record, the case should have gone to the jury.

PER CURIAM. The above opinion is adopted as the opinion of the court, and, for the reasons therein indicated, the judgment is reversed, and the cause remanded for a new trial.

BOGARD'S ADM'R v. ILLINOIS CENTRAL RAILROAD CO.

[COURT OF APPEALS OF KENTUCKY, OCTOBER 6, 1911.]

144 Ky. 649.

1. Carriers—Contagious Disease—Communication to Passenger.

A railroad company is not liable for the death of a passenger who died from measles communicated to him from a fellow passenger on one of its trains, in absence of proof showing that the officers or servants in charge of the train had some knowledge or notice that a passenger thereon was afflicted with such contagious disease, and thereafter failed to exercise ordinary care to prevent contagion to other passengers on the train.

2. Carriers—Transportation of Passengers—Right to Reject.

A carrier may properly refuse to carry passengers whose conduct or condition from intoxication, contagious disease, or other things, is such as to make their presence on board the train dangerous to the lives and health of other passengers.

Appeal by plaintiff from a judgment of the Circuit Court of Marshall County, rendered in favor of defendant in an action brought to recover damages for the death of plaintiff's intestate from measles contracted while a passenger on defendant's train. **Affirmed.**

For appellant—Zeb. A. Stewart.

For appellee—Oliver & Oliver, Blewett Lee, C. L. Sivley, and Trabue, Doolan & Cox.

SETTLE, J. This action was brought by appellant, as administrator

CASE NOTE.

Liability of Railroad Company for Spread of Contagious Disease.

- I. LIABILITY IN GENERAL, 651.
- II. LIABILITY AS CARRIER, 653.

I. Liability in General.

A railroad company is liable for the spread of such a contagious disease as small-pox through the negligence of its employees when acting within the scope of their authority, in consequence of which another is injured as the proximate result of their negli-

gence. *Mellody v. Missouri, K. & T. R. Co.* (Tex. Civ. App.), 124 S. W. 702 (1910).

A railroad company which undertakes to care for and treat one of its employees who is suffering from small-pox, and negligently permits him to escape, is liable to persons to whom he communicates the disease while he is at liberty. The court said: "The same principle attends in reference to animals of known vicious character which the owner is required to restrain to prevent from inflicting injury upon others; and the owners of

of the estate of his deceased infant son, to recover of appellee damages for his death from measles, alleged to have been contracted by the child, while a passenger on its train, from another passenger on the same coach; it being averred in the petition that this passenger had the measles, that the fact of his having the disease was known to appellee's conductor in charge of the train, or by the exercise of ordinary care could have been discovered by him, and that notwithstanding such knowledge on the part of the conductor, or means of ascertaining that the passenger in question was affected with measles, he negligently failed to inform the child of appellant, or the child's mother, who was with him, of the presence in the coach of the infected passenger, or to cause the latter to leave the coach, that others might not contract the measles from him. Within a week of the arrival of appellant's family at Murray, one of the children became ill with the measles. Two or three days later the infant decedent took the disease, and after an illness of a week died.

It appears from the bill of evidence that appellant and his family resided in Carterville, Ill., that measles were prevailing there, and that he sent his wife and children to Murray, Ky., the home of relatives, that they might escape the contagious disease. They were on the way to Murray when they encountered the passenger from whom, it is claimed, the child contracted the measles. According to the testimony of Mrs. Bogard, mother of the infant decedent, and one or two other passengers on appellee's train, the unknown man, alleged to have been afflicted with the measles entered the coach in which they were riding at a station where the train made a stop after leaving Carterville, and that his face manifested an eruption much like measles. Mrs. Bogard further testified that he took a seat next to and in the rear of the seat occupied by herself and children, and leaned forward with his head resting much of the time on the back of their seat, and that soon after he had thus placed himself the conductor entered the coach and took

animals known to be infected with contagious disease must control them in such manner as to prevent them from communicating the disease to animals or other persons. * * * If the railroad company had undertaken to keep a horse known to be infected with contagious disease at the same place and by the same means, and the horse had been permitted, through the negligence of the attendant to escape

and had communicated the disease to a horse, the property of the appellee, there would be no doubt of the liability of the railroad company for damages." *Missouri, K. & T. R. Co. v. Wood*, 95 Tex. 223, 56 L. R. A. 592, 93 Am. St. Rep. 834 (1902).

But a railroad company is not liable in damages for a case of small-pox, communicated to one at least six weeks after the health officers took

up his ticket, in doing which he raised the hat from the passenger's head as if to see his face. If the latter then had the measles, it does not appear from the evidence that the conductor discovered it. At any rate, no statement was made by him indicating that it then became known to him, nor does it appear from the evidence that it was actually brought to his knowledge while the passenger remained in the coach. The mother of the deceased infant did not claim that she or any other occupant of the coach informed the conductor that the passenger in question had the measles, or was suspected of having the disease, and the conductor, in testifying, denied any knowledge of his having the disease. It is true the inference of such knowledge, arising from his lifting the hat of the passenger as his head rested upon the back of the seat in front of him, might be indulged. But it is equally as reasonable to infer that the conductor supposed the passenger was asleep, and raised his hat for the purpose of awakening him, that he might take up his ticket; and, if so, a cursory view of his face under such circumstances might not have enabled the conductor, unskilled as he was in diagnosing diseases, to discover that its appearance was unusual, or indicative of his being affected with measles. The foregoing evidence was allowed to go to the jury, and, being unconvinced by it that appellee's conductor discovered that the unknown passenger had the measles, their verdict was for the appellee; hence judgment was entered in conformity thereto. Appellant complains of that judgment, and of the refusal of the circuit court to grant him a new trial.

His only material contention is that the court erred in instructing the jury. The alleged error complained of is found in instructions 1 and 2, the second being the converse of the first. Both, in substance advised the jury that, although they might believe from the evidence that the infant decedent died of measles contracted from a fellow passenger on appellee's train, they should nevertheless find for appellee.

charge of a number of section hands afflicted with that disease who were occupying a boarding train of the defendant, which stood upon a spur track near plaintiff's residence, in absence of evidence that the railroad company was guilty of negligence in the management of its employees, or that it did not in good faith comply with the directions of the health officers. *Mason v. Ill. Cent. R. Co.*, 25 Ky. Law Rep. 1214 (1903).

II. Liability as Carrier.

A railroad company which has in its employment an agent at a station authorized to sell tickets for use upon its line, who at the time of the purchase of a ticket from him is afflicted with small-pox, is not liable in damages to the one who purchased the ticket and contracted the disease in consequence of exposure by the agent, if none of the superior officers of the company had any knowledge that such

unless they further believed from the evidence that the conductor in charge of appellee's train knew or discovered that such passenger was afflicted with the measles, in time, and by the use of ordinary care, to have prevented the decedent from contracting the disease, and at the same time protect, as far as the use of ordinary care would enable it to do, the health of the passenger afflicted with the measles.

It is insisted for appellant that appellee is responsible for the death of his son of measles contracted of the fellow passenger, if its conductor knew, or by the exercise of ordinary care could have known, of the fellow passenger's having the measles in time to have prevented the decedent from contracting the disease; whereas, the jury were told by the two instructions in question that actual knowledge on the part of the conductor that such passenger had the measles was necessary, and that appellee was only liable for the failure of the conductor to use ordinary care to protect the decedent from contagion, after discovering that the fellow passenger had the disease. In our opinion the instructions correctly state the law. No liability should be made to attach to a railroad company in a case like this, in the absence of proof that the officers or servants in charge of its train, upon which the person claiming to have been injured was being carried as a passenger, had some knowledge or notice that a passenger thereon was afflicted with a contagious disease and then failed to promptly exercise ordinary care to prevent contagion to other passengers on the train, such as the circumstances would admit of, considering the duty of the railroad company, both to the passenger afflicted with the contagious disease and the passenger entitled to protection against contagion therefrom.

The question here is: When did it become the duty of appellee's conductor to protect appellant's decedent from the injury complained of? Obviously, the moment the conductor discovered there was a pas-

agent was afflicted with such contagious disease, as knowledge of the agent as to his condition is not chargeable to the carrier. The court said: "Knowledge is an element in the intent essential to liability. * * * The employing knowingly of an improper person to come into contact with the public as an agent would be gross misconduct, but, if the master or railroad company is faultless in regard to employing an agent and in con-

tinuing his employment, the master or railroad company ought to be excused civilly from the consequence of any secret disease or like infirmity of the agent, in absence of all knowledge thereof. Even a dog which has manifested no vicious propensity may be kept by its owner without being tied or otherwise secured; but if the animal is vicious, and the owner has been notified of the fact, the duty is then imposed upon him to keep the

senger aboard the train afflicted with the measles, a contagious disease, calculated to endanger human life or health. Adoption by the courts of the rule of diligence contended for by appellant's counsel would require all carriers of passengers to keep on each of its trains, or at each of its passenger stations, a skilled physician to examine every person obtaining or demanding transportation, to avoid the possibility of receiving a passenger affected with a contagious disease. Neither innkeepers, proprietors of theaters, schools, nor churches, have ever been subjected to such an unreasonable rule of diligence, and no sound reason is perceived for applying it to carriers of passengers. We are not aware that the precise question here presented has ever come to us for decision, but the principle decisive of it has been applied to analogous facts, by this and other courts of similar jurisdiction, in numerous cases.

A common carrier, independently of the contractual relation, is under a general obligation to receive and carry upon its trains all proper persons who apply for transportation and offer to pay the regular fare for such service. By the term "proper persons" is meant persons whose status or condition apparently entitles them to be carried as passengers. On the other hand, the carrier has the right to refuse to receive or carry as passengers, improper persons; that is, persons whose condition or conduct is such, from intoxication, disorderly conduct, contagious diseases, or other things, to make their presence on the train dangerous to the lives or health of other passengers. Likewise, if the condition or conduct of a person, after being received as a passenger, becomes such as to endanger the lives or health of other passengers, or to unreasonably annoy or offend them, it is the right and duty of the carrier's servant in charge of the train, upon receiving notice thereof, to eject such offending persons from the train; but in doing so they must also exercise due care to protect his health and

animal secured, and he is responsible for any mischief if he fails to observe this duty. The *scienter* must be established. Long (plaintiff) was lawfully in the station at Anness and was without fault on his part, in purchasing his ticket of Clayton, the agent; and in selling his ticket Clayton was acting clearly within the scope of his employment, but his disease was not known to the railroad company, or any of its superior officers, and, although

it was contemporaneous with his employment, the railroad company cannot be charged with the consequences thereof. The negligence or accidental act, if any, of the agent in imparting a contagious disease to Long, the purchaser of the railroad ticket, was not within the scope of his authority, so as to charge the company, his master. The sickness of an agent with a contagious disease cannot be presumed to be authorized or directed by the master,

person from danger or unnecessary discomfort. In such a case the carrier is bound to exercise a reasonable discretion, according to conditions as they reasonably appear at the time. Thompson on Negligence, vol. 3, 3225.

The principle that must control the servants of the carrier, in a case like the one before us, is correctly stated in the opinion in the case of *Clark's Adm'x v. Louisville & N. R. Co.*, 20 Ky. Law. Rep. 1839, 49 S. W. 1120. In that case Clark was a passenger on the defendant's train. Another passenger took a quantity of gasoline into the same coach in which Clark was riding. It ignited and exploded, by reason of which he was severely injured. The trial court peremptorily instructed the jury to find for the defendant. In the opinion, affirming the judgment it is said: "It may be stated briefly, in assuming the liability of a railroad to its passenger for injury done by another passenger, only where the conduct of this passenger has been such before the injury as to induce a reasonably prudent and vigilant conductor to believe that there was reasonable ground to apprehend violence and danger to the other passengers, and in that case asserting it to be the duty of the conductor of the railroad train to use all reasonable means to prevent such injury, and if he neglects this reasonable duty, and the injury is done, that then the company is responsible; otherwise, it is not."

The opinion quotes with approval from the case of *Gulf, C. & S. F. R. Co. v. Shields*, 9 Tex. Civ. App. 652, 10 Am. Neg. Cas. 325, 29 S. W. 652, in which case the plaintiff was injured by alcohol which had been carried upon the train by another passenger. In the opinion in that case it is said: "It was but a short period of time after the alcohol was spilt when it was set on fire and the accident occurred, and it was not shown that appellant's employees knew that the jug contained alcohol. In fact, it is not shown that the conductor or any other employee knew that Harris had a jug with him until it fell out of a

and is not an incident in any way to the employment of selling tickets, or acting as agent at a station. We are not referred to any decisions, and we cannot find any in the books, where a master or railroad company has been held liable in a case like this." *Long v. Chicago, K. & W. R. Co.*, 48 Kan. 28, 15 Am. Neg. Cas. 18n, 15 L. R. A. 319, 30 Am. St. Rep. 271 (1892).

But knowledge on the part of a

railroad ticket agent that he was infected with small-pox and would expose to that disease any one who came into contact with him, was held in *Missouri, K. & T. R. Co. v. Raney*, 44 Tex. Civ. App. 517 (1907), to be chargeable to the railroad company, and renders the latter liable in damages to the wife of a passenger to whom the disease was communicated from her husband who had himself

sack, though the conductor had collected his fare, and doubtless knew he had the sack on the seat with him. It cannot be successfully denied that Harris had the right as a passenger to carry baggage in the train, and that he had a right to carry it in a sack if he chose to do so. We think it is equally clear that, in the absence of some intimation or circumstance indicating that the sack contained something dangerous to other passengers, it was not the duty of the appellant's conductor or other employees to open the sack and examine its contents." *Quinn v. Louisville & N. R. Co.*, 98 Ky. 231, 8 Am. Neg. Cas. 302, 32 S. W. 742, 17 Ky. Law Rep. 811; *Wood v. Louisville & N. R. Co.*, 101 Ky. 703, 3 Am. Neg. Rep. 399, 42 S. W. 349, 19 Ky. Law Rep. 924; *L. & E. R. Co. v. Vincent*, 96 S. W. 898, 29 Ky. Law Rep. 1049; *Louisville & N. R. Co. v. Renfro's Adm'r*, 142 Ky. 590, 135 S. W. 266.

A case more directly in point is that of *Long v. Chicago, K. & W. R. R. Co.*, 48 Kan. 28, 15 Am. Neg. Cas. 18n, 28 Pac. 977, 15 L. R. A. 319, 30 Am. St. Rep. 271. In that case Long, in purchasing a ticket to ride on defendant's railroad, contracted the smallpox from Clayton, its agent, who sold him the ticket, and he sought to recover of the railroad company damages for the injury thus sustained. The trial court sustained a demurrer to the petition. On the appeal the Supreme Court of Kansas held that the plaintiff was without right of recovery, saying in the opinion: "In this case it is not charged that the railroad company or any of its superior officers knew that its agent at Annis was afflicted with any disease, contagious or otherwise. We do not think that a master or a railroad company is liable in damage to a third person, because such person has contracted a contagious

contracted the disease from the agent at the time of purchasing tickets for himself and wife. In commenting on the duty of the carrier, the court said: "The appellant (carrier), under the common law, owed to the individuals composing the public who dealt with it the duty to keep them from having contagious diseases communicated to them by its agent while they were dealing with it through such agent. There are two classes of cases in which a duty is owed to the public: One is where the duty is owed to the public as such, and for a failure to perform which no action lies; the other is where the duty is due to or intended

for the benefit of the individuals composing the public, for the failure to perform which an action lies in favor of any one injured by such failure." In commenting on the decision in *Long v. Chicago, Kansas & W. R. Co.*, *supra*, the court said: "We do not think the doctrine announced in that case is supported either by principle or sound reason, and hence we decline to follow it."

This note does not include cases on the subject of the Liability of a Railroad Company to a Servant or Employee Who Contracts a Contagious Disease From a Passenger.

or infectious disease from an agent, when the master or company has no knowledge that the agent is afflicted."

In view of the foregoing authorities, we must express our approval of the instructions given by the trial court in the case at bar, and, as the evidence in the case authorized the verdict returned by the jury, no reason is perceived for disturbing the judgment. It is therefore affirmed.

WELLS V. GREAT NORTHERN RAILWAY CO.

[SUPREME COURT OF OREGON, MARCH 14, 1911.]

59 Ore. 165, 114 Pac. 92.

1. Carriers—Limited Liability—Waiver.

Issuance by a railroad company of a check for a trunk which it is notified contains watchmaker's and jeweler's tools, besides clothing, amounts to a waiver of a contract stipulation limiting its baggage liability to wearing apparel only.

2. Carriers—Limited Liability—Negligence.

A clause printed on a ticket issued at a reduced rate, which limits the carrier's liability for baggage, although assented to by the passenger, will not exonerate the carrier from accountability for loss due to the negligence of its agents.

3. Evidence—Burden of Proof—Negligence.

It is incumbent upon a carrier, which has undertaken to transport the baggage of a passenger, pursuant to an express contract limiting its liability, to show that the loss of the baggage, due to the derailment and burning of the car containing it, did not result from its negligence.

4. Pleading—Negligence—Sufficiency.

In an action brought to recover damages for the loss of baggage destroyed by the derailment and burning of a baggage car, the complaint, if it contains a suggestion of negligence, is sufficient, although it fails to set forth the facts constituting the negligent act or omission, or to aver the facts composing the secondary agency or force, or to detail the resultant injury and the damages, where the burden of disproving negligence rests on the carrier.

5. Trial—Finding—Necessity.

A finding as to a special contract limiting the carrier's liability for loss of baggage, is unnecessary in an action to recover damages therefor, where it is found that the carrier was negligent.

Appeal by defendant from a judgment of the Circuit Court of Multnomah County, rendered in favor of plaintiff in an action brought to

NOTE.

On the subject of Liability of a Carrier for Loss of Baggage, see notes in 1 Am. Neg. Rep. 1; 12 Am. Neg. Rep. 64-74.

And on the subject of Liability of a Carrier for Loss of a Passenger's Personal Effects, see note in 8 Am. Neg. Rep. 51-57.

And on the subject of the Liability

of a Carrier for Loss of Merchandise in Absence of Knowledge and Contract, see note in 9 Am. Neg. Rep. 164.

And on the subject of Liability of a Carrier for Injury to Goods and Freight in Transit, see note in 21 Am. Neg. Rep. 528-566.

And on the subject of Limitations and Conditions on Passengers' Tickets, see note in 21 Am. Neg. Rep. 207-214.

recover the value of a certain trunk and its contents lost by the derailment and burning of a baggage car, alleged to have been caused by the negligence of defendant. Affirmed.

For appellant—Omar C. Spencer.

For respondent—John F. Logan.

COMPLAINT.

Plaintiff complains of defendant and for cause of action alleges:

I. That at all times hereinafter mentioned the defendant was and is a railroad and railway corporation engaged in intra and interstate passenger traffic, with a principal office and place of business at St. Paul, in the State of Minnesota, and with railway lines extending westward through the State of Minnesota, North Dakota, Idaho and Washington, and has passenger, freight offices and a place of business in Portland, Multnomah County, State of Oregon.

II. That heretofore on or about the 13th day of April, 1907, the plaintiff purchased a ticket at Chicago, from defendant's agent, over the Chicago, Burlington and Quincy Railroad to Portland, Oregon. The ticket called for passage from Chicago, via Chicago, Burlington and Quincy Railway to St. Paul, Minnesota, and from St. Paul, Minnesota, over the lines of the defendant corporation to Spokane, in the State of Washington, and from thence to Portland, Oregon, by way of the Oregon Railway and Navigation Company.

III. That said ticket was purchased for a valuable consideration, and that in addition to the customary amount of baggage, to-wit, 150 pounds, a special contract was made between plaintiff and defendant for and in consideration of the sum of \$4.45, to transfer extra baggage, or excess baggage from said City of Chicago, Illinois, by the same routes hereinbefore set out, to Portland, Oregon.

IV. That the defendant accepted carriage of said excess baggage, as evidence by excess baggage check designated as "Class C. No. 5261," issued on the date of the purchase of the ticket.

V. That thereafter the defendant entered upon its contract of carriage of the plaintiff and the baggage and excess baggage, including the following articles (list omitted; consists of jeweler's and watch-maker's tools and material, and clothing).

VI. That afterwards the plaintiff, upon arrival in the City of Spokane, in the State of Washington, to-wit, on the 16th day of April, 1907, presented his checks to the duly authorized railway passenger and baggage representatives of the defendant corporation at Spokane,

in the State of Washington, but was there informed that the baggage had not arrived. That thereafter the plaintiff upon a presentation of his checks to the passenger officials, agents and servants of the defendant at the City of Spokane, State of Washington, was informed by said officials agents and servants that all the baggage owned by the plaintiff, and contracted to be carried by the defendant in the manner and form hereinbefore set out, was destroyed in a railroad wreck while the said baggage was en route from St. Paul, Minnesota, to Spokane, Washington, over the lines of and while in the custody and care of the defendant corporation under the contract of carriage and transportation hereinbefore set out.

VII. That heretofore, and before the filing of this action, this plaintiff has made claim of said defendant corporation for the value of his baggage as hereinbefore set out, and has made specific claim for the sum of \$390.45, the same being the reasonable value of the personal property so lost as aforesaid by the defendant corporation, but defendant has failed and neglected to pay the same or any part thereof.

VIII. Plaintiff further alleges with reference to the loss of said baggage that the train on which said baggage was being conveyed was, while passing through the State of Dakota, wrecked and destroyed by fire by reason of the careless and negligent handling of the same by the officers, agents and servants of the defendant corporation.

IX. That at the time of the purchase of the ticket for transportation, and also at the time of the payment of the consideration for the carrying of the excess baggage, plaintiff informed the defendant's agent who sold him the ticket and gave him the excess baggage check, that the trunk on which the excess baggage was paid contained articles aside from wearing apparel, the tools of his trade and profession, to-wit, watchmaker's tools and materials.

Wherefore, plaintiff demands judgment against the defendant in the sum of \$390.45, and for his costs and disbursements.

ANSWER.

The defendant, the Great Northern Railway Company, answering plaintiff's complaint herein, alleges and says:

I. The defendant admits the allegations contained in the first, second, third, and fourth paragraphs of plaintiff's complaint.

II. Answering the fifth paragraph of plaintiff's complaint, the defendant admits that it entered upon its contract of carriage of the plaintiff and the baggage and the excess baggage, but denies that it has any knowledge or information sufficient to form a belief as to

whether or not said baggage included the articles set out in the schedule attached to said complaint and marked "Exhibit A;" denies that it has any knowledge or information sufficient to form a belief as to what said baggage included.

III. Defendant admits the allegations contained in the sixth paragraph of plaintiff's complaint.

IV. Answering the seventh paragraph of plaintiff's complaint, defendant admits that before the filing of this action, the plaintiff made a claim from the defendant for the sum of four hundred sixty-nine and 70-100 dollars (\$469 70), but denies that said sum so claimed was the reasonable value of said baggage or of the personal property so lost, and denies that said baggage and personal property so lost exceeded the sum of one hundred dollars (\$100) in value.

V. Answering the eighth paragraph of plaintiff's complaint, the defendant admits that the loss of said baggage was occasioned while the train on which it was being conveyed was passing through the State of Dakota, and by said train being wrecked and destroyed by fire; denies that the wreck and destruction of said train was occasioned by the careless or negligent handling of the same by the officers, agents or servants of the defendant.

VI. Answering the ninth paragraph of plaintiff's complaint, the defendant denies that at the time of the payment of the consideration for the carrying of the excess baggage, or at any other time, the plaintiff, or any one in his behalf, informed the agent who sold him the ticket, or any other person, or the agent who gave the excess baggage check, or any other person, that the trunk on which the excess baggage was paid, contained articles aside from wearing apparel or the tools of his trade or profession, or watchmaker's tools or material; defendant denies that at the time of the purchase of said ticket, or at the time of the payment for the carrying of said excess baggage, or at any other time, the plaintiff, or any person in his behalf, gave any information whatever to the defendant, or any of its agents, or to any of the carriers over whose lines said transportation was sold, or any agent thereof, as to the articles said baggage contained.

And for a further, separate and affirmative defense, *pro tanto*, defendant alleges:

That the ticket for the transportation of the plaintiff was sold at a reduced rate, and at the time said ticket was sold, in consideration of said reduced rate, the plaintiff entered into and signed a contract whereby it was agreed, in case of the loss of said plaintiff's baggage, the damage for such loss should not exceed the sum of one hundred dollars (\$100).

Wherefore, having fully answered, defendant prays for judgment against the plaintiff, and for its costs and disbursements herein.

STATEMENT OF FACTS: This is an action to recover \$469.70 as the value of a trunk and its contents, lost by the derailing and burning of a baggage car alleged to have been caused by the negligence of the defendant, whose agent, it is averred, was informed of the contents of the trunk before undertaking its transportation. The answer denied all carelessness in operating the train, and as a partial defense alleged that for a valuable consideration the parties had agreed that in case of loss or injury to plaintiff's baggage a recovery therefor should not exceed \$100. The statements of new matter in the answer having been denied in the reply, the cause was tried without a jury, and findings of fact and of law were made conformable to the averments of the complaint, except that the value of the property involved was ascertained to have been only \$390.45 for which sum judgment was rendered, and the defendant appeals.

MOORE, J. It appears from the bill of exceptions that on April 13, 1907, first-class passenger fare from Chicago, Ill., to Portland, Ore., over the lines of railway hereinafter named was \$61.50, on which day plaintiff, for the sum of \$33.00, secured at Chicago a coupon limited "colonist" ticket good for a passage from that city over the line of the Chicago, Burlington & Quincy Railway Company to St. Paul, Minn.; thence over the line of the defendant, the Great Northern Railway Company, to Spokane, Wash.; and thence over the line of the Oregon Railway & Navigation Company to Portland. The ticket contained, *inter alia*, the following clause: "(7) Baggage liability is limited to wearing apparel only, not exceeding \$100 in value. I hereby agree to all the conditions of the contract"—which plaintiff signed. Wells testified that when he delivered to the railway agent at Chicago his trunk to be checked he was compelled to pay excess baggage; that, in answer to the inquiry of the baggagemaster as to the contents of the trunk, he replied that it consisted of his watchmaker's and jeweler's tools and clothing; that, while making the journey, defendant's train on which he was riding left the track, by reason of spreading rails, and the locomotive and baggage cars were burned, destroying his trunk and its contents; and that at the time of the derailment the train was running pretty fast. The defendant offered no evidence respecting the cause of the loss. It is maintained by defendant's counsel that, the ticket having been purchased at a reduced rate, the contract limiting the recovery was supported by an adequate considera-

tion, and, such being the case, an error was committed in rendering judgment for more than \$100.

By the principles of the common law the person who for hire undertook to carry for the public goods that he customarily transported and which were left with him for that purpose was an insurer and could not escape liability for nonperformance of the contract, except by showing that his failure was occasioned by the act of God or the public enemy. Angell, Car. (4th Ed.) § 46; Lawson, Cont. Car. § 127; Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 238, 32 Am. Dec. 455; "The law," says Lord Chief Justice Holt in *Coggs v. Bernard*, 1 Smith's Ld. Cas. (Hare & Wallace's notes) 369, 376, [2 Ld. Raymond, 909, 1 Am. Neg. Cas. 948] "charges this person thus intrusted to carry goods against all events, but acts of God and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point."

To the original exceptions of the act of God or the public enemy, courts, in order to meet the reasonable requirements of a commercial age, have added exemptions from liability of a common carrier when a failure to transport or deliver goods arose from an act of public authority, an act of the shipper, or the intrinsic nature of the property intrusted to it. Hutchinson, Car. (3rd. Ed.) § 265; 6 A. & E. Enc. L. (2d Ed.) 265; 6 Cyc. 377. A carrier of passengers, upon the sale to any person of a ticket good for a passage by a designated mode of conveyance from one place to another, by issuing to him a baggage check upon the delivery to it of his traveling effects, of a specified weight and properly incased, impliedly stipulates for the consideration thus received also to transport his personal baggage, and in caring for the receptacle and its contents is governed by the rule and subject to the exceptions applicable to common carriers of goods. Angell, Car. (4th Ed.) § 571; Woods v. Devin, 13 Ill. 746, 748, 56 Am. Dec. 483; Chicago, etc., R. Co. v. Fahey, 52 Ill. 81, 83, 4 Am. Rep. 587; Merrill v. Grinnell, 30 N. Y. 594, 609; Hannibal R. Co. v. Swift, 12 Wall. 262, 273, 20 L. Ed. 423; Orange County Bank v. Brown, 9 Wend. (N. Y.) 85, 114, 24 Am. Dec. 129.

The right of a common carrier by an express contract that is reasonable and just to limit his liability as an insurer of goods when intrusted to him for transportation is well recognized. *Lawson*, Cont. Car. § 28; *Moore v. Evans*, 14 Barb. (N. Y.) 524; *Normile v. Oregon Nav. Co.*, 41 Or. 177, 69 Pac. 928; *Laing v. Colder*, 8 Pa. 479, 10 Am. Neg. Cas. 144, 49 Am. Dec. 533; *Rose v. N. P. Ry. Co.*, 35 Mont. 70, 88 Pac. 767, 119 Am. St. Rep. 836; *Gomm v. O. R. & N. Co.*, 52 Wash. 685, 101 Pac. 361, 25 L. R. A. (N. S.) 537; *York Co. v. Central R. R.*, 3 Wall. (U. S.) 107, 18 L. Ed. 170; *Bingham v. Rogers*, 6 Watts & S. (Pa.) 495, 40 Am. Dec. 581; *Atwood v. Reliance Transportation Co.*, 9 Watts (Pa.) 87, 34 Am. Dec. 494. Though a contrary rule may exist in England (*Lawson*, Cont. Car. § 25), public policy, in America, inhibits a bailee for hire, by special agreement that he can make, to relieve himself from liability resulting from his negligence, and as a deduction from this principle it follows that, when a loss of or injury to goods arises from his carelessness or that of his agents, a contract attempting to limit liability in that particular is rendered nugatory. *Angell*, Car. (4th Ed.) § 267; *Lawson*, Cont. Car. § 28; *N. Y. Central R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, 381, 10 Am. Neg. Cas. 624, 21 L. Ed. 627; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 183, 23 L. Ed. 872. In *Tewes v. North German Lloyd S. S. Co.*, 186 N. Y. 151, 20 Am. Neg. Rep. 701, 78 N. E. 864, 8 L. R. A. (N. S.) 199, 9 Am. & Eng. Ann. Cas. 909, a different conclusion was reached; but the dissenting opinion of Mr. Justice Haight seems to present the better reason. The notes to that case show the conflict of authority on the subject under consideration. As illustrating the rule that an agreement endeavoring to exempt a carrier of passengers from liability accruing from its carelessness, it has been held that a railroad pass, given for a consideration but having printed on the back of the ticket a declaration that the person accepting it assumed all risk of accidents resulting from negligence of the carrier's agents, did not estop the passenger from showing that he was not subject to the conditions undertaken to be imposed. *Grand Trunk Ry. Co. of Canada v. Stevens*, 95 U. S. 655, 10 Am. Neg. Cas. 638, 24 L. Ed. 535. It has been ruled that the liability of a railroad company does not depend on the fact that compensation for the transportation of a passenger has been paid to it, but that the same degree of care is imposed upon the carrier in the case of a person traveling on a free pass as in the case of a passenger paying full fare, and that the negligence of an agent from which injury results fixes upon the carrier a liability which cannot be avoided or limited by express contract. *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 640, 10 Am. Neg. Cas. 279; *Jacobus v. St. Paul & Chicago R. Co.*,

20 Minn. 125 (Gil. 110), 9 Am. Neg. Cas. 489n, 18 Am. Rep. 360; Yazoo, etc., R. Co. v. Grant, 4 Am. & Eng. Ann. Cas. 556, [86 Miss. 565]. See notes to latter case as to a contrary doctrine.

In *Coward v. East Tenn., etc., R. Co.*, 16 Lea (Tenn.) 225, 57 Am. Rep. 227, a ticket was purchased at a reduced rate containing the following clause: "None of the companies represented in this ticket will assume any liability on baggage except for wearing apparel, and then only for a sum not exceeding \$100"—which provision, with full understanding thereof, the passenger assented to by appending his signature. Based on the ticket a trunk was checked that did not reach its destination until several hours after the passenger's arrival, and it was then discovered that the lock had been filed, and a watch and chain and a diamond pin had been stolen. In an action to recover the value of the property taken, it was held that the jewelry was the customary wearing apparel of a lady occupying the station of the passenger, and that the payment of the reduced rate did not absolve the carrier from liability for its own negligence, which consisted in a failure to transport the trunk on the same train with the passenger; the court saying: "The separation of the passenger and the baggage and their transportation by different trains is nowhere explained." And a judgment was rendered against the carrier for \$1,400, as the value of the property stolen.

In the case at bar, the defendant undertook to escape liability for the watchmaker's and jeweler's tools, a reasonable quantity of which, when placed in plaintiff's trunk for transportation, constituted a part of his personal baggage. *Davis v. Cayuga, etc., R. Co.*, 10 How. Prac. (N. Y.) 330; *Kan. etc., R. Co., v. Morrison*, 34 Kan. 502, 9 Pac. 225, 55 Am. Rep. 252; *Porter v. Hildebrand*, 14 Pa. 129. The defendant was authorized to refuse the transportation of anything but personal effects of a passenger. This was a right, however, which it could waive, and when Wells delivered to its Chicago agent a trunk, and asserted that it contained property not classified as baggage, the issuing of a check with knowledge of the contents rendered the carrier liable for the loss in case the derailing and burning of the car was occasioned by the negligence of its servants. 3 *Thomp. Neg.* § 3402; *Oakes v. N. P. R. Co.*, 20 Or. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126; *Bergstrom v. Chicago, etc., R. Co.*, 134 Iowa, 223, 111 N. W. 818, 10 L. R. A. (N. S.) 1119, 13 Am. & Eng. Ann. Cas. 239.

As the principles under which the freedom of contract and private dealings is restricted by law for the good of the community demanded that defendant should exercise due care in transporting baggage we conclude that the ticket issued to him at a reduced rate, and the clause

attempting to limit liability as to the character and the value of the contents of the trunk, though assented to by him, did not exonerate it from accountability for the loss if it resulted from the negligence of the carrier's agents.

The burning of the trunk and its contents in the manner alleged in the complaint having been admitted by the answer, the remaining question to be considered is: Upon whom was cast the burden of proof as to whether or not the loss was caused by the negligence of defendant's servants?

Though a limitation by express agreement may relieve a common carrier of liability for loss of or injury to goods intrusted to him for transportation, except for negligence of his servants, the preponderance of authority in America supports the doctrine that in cases of special contract the burden of proving negligence devolves on the shipper. *Lawson, Cont. Car. § 248*. In the next section this author observes: "In *Greenleaf on Evidence* it is said: 'And, if the acceptance of the goods was special, the burden of proof is still on the carrier to show not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care.' 2 *Green. Ev. § 219*. This rule has the support of a few authorities." As upholding the principle thus announced, attention is called to several decisions, and among them to the case of *Grey's Ex'r v. Mobile Trade Co.*, 55 Ala. 387, 28 Am. Rep. 729, in referring to which the text-writer further remarks: "It and the rule as stated by Mr. *Greenleaf* are certainly founded upon reason and public policy, but they lack, as has been seen, the support of authority." *Lawson, Cont. Car. § 250*.

In case of injury to goods the carriage of which has been undertaken pursuant to an express contract made with the owner limiting liability, we believe that, as the common carrier is not a gratuitous bailee, the burden ought to be imposed on him to disprove negligence, which should be presumed from the failure to ship or deliver. This rule would require the proving of a negative; but, as the agents of the carrier must have a better knowledge of the origin and consequences of the loss than any other person, he should be required to show that the damage did not result from negligence. Any other rule would subject the shipper to much expense in attempting to discover the cause of the injury to or loss of his goods, and since this information can readily be supplied by the carrier he ought to be required to disprove negligence. If the burden devolved on the shipper, he might be compelled to rely on the testimony of servants in the em-

ploy of the carrier whose hope of continual engagement might affect their sworn statements. For these reasons we think it was incumbent upon the defendant to show that the derailing and burning of the baggage car did not result from negligence.

In actions to recover damages based on carelessness, the proximate cause is any act or omission that immediately produces or fails to prevent the injury, or that which directly puts into operation another agency or force, or interposes an obstacle whereby injury is inflicted that would not have happened except for the original negligent act or omission. 8 A. & E. Enc. L. (2 Ed.) 571; 32 Cyc. 745; Hartvig v. N. P. L. Co., 19 Or. 522, 25 Pac. 358; Ahern v. Or. Tel. Co., 25 Or. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635; Robinson v. Taku Fishing Co., 42 Or. 537, 71 Pac. 900. When in such an action the complaint sets forth the facts constituting the negligent act or omission, discloses, in logical sequence, the facts composing the secondary agency, force or obstacle, if any, and details the resultant injury and the damages, the pleading is sufficient. In the case at bar, the complaint does not conform to these requirements, but, as the burden of proof rested on the defendant, a suggestion of negligence in plaintiff's primary pleading was, in our opinion, adequate for that purpose. The defendant, probably relying on the weight of authority respecting the burden of proof, offered no evidence on the question of negligence.

Objection is made because the court did not make a finding as to the special contract alleged in the answer and denied by the reply. The finding that defendant was negligent, in consequence of which plaintiff's trunk and its contents were destroyed, renders void the attempted limitation of liability, which conclusion determined the right of recovery, rendering it unnecessary to make any findings on such issue. Lewis v. First National Bank, 46 Or. 182, 78 Pac. 900; Freeman v. Trummer, 50 Or. 287, 91 Pac. 1077; Naylor v. McColloch, Mayor, 54 Or. 305, 103 Pac. 68.

It follows from these considerations that the judgment should be affirmed, and it is so ordered.

SCHNATTERER v. BAMBERGER et al.

[COURT OF ERRORS AND APPEALS OF NEW JERSEY, MARCH 6, 1911.]

81 N. J. Law, 558.

1. Negligence—Condition of Store—Notice of Defect.

The defendant kept a department store, in which was a stairway connecting the first floor with the basement, for the use of its customers. The plaintiff testified that in treading on one of the steps in going down the stairway the heel of her shoe caught in a brass nosing (originally attached to the edge of the wooden step to prevent its wear), which was loose, but was not then noticed by her, causing her to trip and fall downstairs, and it was held that, when the plaintiff rested her case, the evidence failed to show the storekeeper had been guilty of any want of reasonable care in keeping the stairway safe for her use, for the reason it had not appeared that the defect which she had said caused her to trip and fall had (a), in fact, been brought to the notice of the storekeeper before the accident; or (b) had existed for such a length of time as to charge the storekeeper with notice thereof. In the absence of proof of one of these conditions, a *prima facie* case that defendant had been guilty of negligence was not established.

2. Negligence—Condition of Store—Degree of Care.

The defendant was not an insurer against accidents, and its duty to the plaintiff was satisfied when it had used reasonable care to maintain its store passages in a condition safe for her proper use.

3. Negligence—Condition of Store—Failure to Inspect.

The question of what shall suffice to constitute the reasonable period of time within which the failure of the storekeeper to make proper inspection of his floors and stairways in order to discover and remedy dangerous defects in them before he is chargeable with responsibility for accidents of the present nature is one which in cases where the facts are undisputed, and different inferences cannot reasonably be drawn from the same facts, is for the court, and not for the jury, to determine.

[Headnotes by the Court.]

Error to the Supreme Court to review a judgment of nonsuit directed in an action brought to recover damages for personal injuries caused by falling down stairs in defendant's department store. Affirmed.

For plaintiff in error—Abner Kalisch, and Samuel Kalisch, Jr.

For defendants in error—Edward M. Colie.

NOTE.

On the subject of Liability for Personal Injuries Sustained in Stores and

Places of Business, see note in 8 Am. Neg. Rep. 266.

DECLARATION.

Louis Bamberger, Felix Fuld and Louis M. Frank doing business under the firm name of L. Bamberger & Company, the defendants in this suit, were summoned to answer unto Pauline Schnatterer, the plaintiff therein, of an action in tort, by Abner Kalisch, her attorney, complains:—For that whereas, the said defendants heretofore, to wit, on the twenty-fourth day of April, nineteen hundred and nine, at Newark, in the County of Essex and State of New Jersey, was and for a long time prior thereto, had been in possession of a certain store situated on the first floor of the building known and designated as Numbers 135 and 147 Market Street, in the City of Newark, County of Essex and State of New Jersey, and being so possessed of said store, the said defendants were then and there using and occupying the same and conducting therein the business of selling dry goods, wares and merchandise, which were then and there in said store, and the said defendants conducting the said store as aforesaid, then and there invited all persons to enter said store desirous of purchasing any of said goods and chattels.

And the plaintiff avers that in the floor of said store, there was a certain hole and opening which opened into a stairway leading to a basement in said building under the store, in which basement goods, wares and merchandise were also sold, and which said stairway was maintained and used by the said defendants as a means of access to their said basement; that the said opening lay level and open with the said floor, so that a person could step from the floor to the stairway leading into the basement as aforesaid.

And the plaintiff avers that it became and was the duty of the said defendants to use due and proper care that the said stairway leading from said floor of said building to said basement was in a safe and proper condition and repair, and to use and maintain said stairway in such a way so that it should not be or become dangerous to life or limb to those persons lawfully in said store and lawfully using said stairway; but the plaintiff avers that the said defendants, not regarding their duty in that behalf, did not use due and proper care to see that said stairway leading from said floor to said basement was in a good, safe, and proper condition and repair, and did not use due and proper care in maintaining and using said stairway in such a manner that it should not be or become dangerous to life or limb, but wholly failed and neglected so to do, and on the contrary, on the day and year last aforesaid, to wit, at Newark, in the County of Essex and State aforesaid, the said defendants did improperly,

carelessly, and negligently suffer and permit the said stairway to be and remain in an unsafe and dangerous condition, and did then and there improperly, carelessly, and negligently suffer and permit the said stairway to become dangerous, defective and in an unsound condition, so that the said plaintiff, on the day and year last aforesaid, then and there being lawfully at the said store at the express invitation of the said defendants, while lawfully descending the said stairway leading from said first floor to the basement of said building, suddenly, without fault or negligence on her part, *tripped* by reason of the defective, unsafe, dangerous and unsound condition of the stairway, *and was precipitated and fell headlong down the stairway to the bottom of said basement* of the store, and by reason of said fall, sustained severe and painful and permanent injuries about her body and limbs, and was also internally injured, and by means of the premises the said plaintiff was otherwise greatly bruised, wounded and injured, and became and was sick, sore, lame and disordered and so remained and continued for a long space of time, to wit, from thence hitherto, during all which time she suffered and underwent great pain, and in the future will suffer and undergo great pain, and was hindered and prevented, and in the future will be hindered and prevented from transacting and attending to her necessary and lawful affairs by her during all that time to be performed and transacted, and lost and was deprived of, and in the future will lose and be deprived of divers great gains, profits and advantages which she might and otherwise would have derived and acquired, to wit, at Newark, in the County of Essex, to her damage in the sum of Five Thousand Dollars.

VREDENBURGH, J. Between the hours of 8 and 9 o'clock of Saturday night, April 24, 1909, the plaintiff, while shopping with a lady companion in the defendant's large department store in Newark, N. J., and proceeding down the stair or passageway leading from the first floor to the basement, stepped upon the third step from the top of the stair, tripped, and fell down the stairway, sustaining the injury for which she has brought suit.

The plaintiff claims her fall was caused by a loosened brass edging or nosing originally fastened by screws to the outer edge of the step for the protection of the wood from wear, and was, as the testimony of the plaintiff's brother (who saw it on the Monday following the accident) states, about one-quarter of an inch in thickness, by about one inch in width. The precise negligence imputed by the plaintiff to the defendant is not that it had originally improperly constructed this

metal strip upon the step, but that since its construction the company had suffered it to become loosened from the step and raised to an extent sufficient to catch the heel of her shoe as she trod upon the step. In her testimony she thus particularizes the accident: That when she went down the stairs she did not, either before or at the time of her fall, notice the brass was loosened, but that when she and her companion returned upstairs, about half an hour later, she examined the step, and found, to use her words, "this brass they had on the edge was loose on it, and it was kind of raised and my heel caught in it;" that the nosing piece was about one-eighth of an inch away from the step, and about the same distance above the level of it. Her companion (Miss Ingram), also testified that they went down stairs together, and she did not then notice what caused plaintiff's fall, but that when they came back upstairs she noticed the brass was loose. No witness says that this condition existed prior to the time of the occurrence of the accident, nor was there any evidence that the step was in prior disrepair in any respect.

The brief of the plaintiff in error concedes the fact to be, as the evidence also shows, that "this stairway was used every day by a large concourse of people." Doubtlessly the shoes upon the feet of countless numbers of persons were continually subjecting the brass nosing to wear and tear and of necessity at some time during such wear a weakening of its fastenings to the step would occur before they became loosened. In the present instance, for aught that appears to the contrary, it may readily have happened that the act of the plaintiff in placing her weight upon the metal nosing was the first force to produce this loosened condition; but, if not, the accident is no proof that the nosing piece had been in the condition testified to at a period so long before the accident as to charge the defendant with notice of it. There is nothing in the evidence to justify the inference that the company had at any time before the accident either knowledge or notice of such defect. Nor was there any proof that it had failed or neglected to make proper inspection of the stairway in order to discover and remedy any defect. While the rule of law is undoubted that in such cases the defendant company owes the duty to its customer to exercise reasonable care to keep its store in a safe condition for the use of its customers, and if the latter be injured in consequence of the defendant's failure to perform that duty, it is responsible for the consequences, yet what under the undisputed circumstances constituted the exercise of reasonable care by the owner of the premises was the pivotal question to be solved in this case by the trial court upon the motion to nonsuit.

When the plaintiff rested her case, it had not appeared that the defendant company had been guilty of any want of reasonable care in the keeping of its store safe for her use, for the reason that she had failed to show that the defective condition of the brass edging which she said existed on the night of the accident of April 24th had either (a) been in fact brought to the previous notice of the defendant, or, failing in proof of such actual notice, that (b) the defect had existed for such space of time before that occurrence as would have afforded the company sufficient opportunity to make proper inspection of its stairways to ascertain their condition as to safety, and to repair their defects. In the absence of proof of either, the legal presumption is that defendant had used reasonable care. It need hardly be added that the company was not an insurer of the safety of its customers against accidents happening to them while walking or running up and down its stairways in its store. Its duty to the plaintiff was satisfied when it used reasonable care to maintain them in a condition safe for her proper use.

The following decisions rendered in this State in actions between landlord and tenant in which the tenant brought suit against his landlord for injuries arising from the failure of the latter to keep in safe repair the rented premises involve principles analogous to those where the relative rights and duties of customer and storekeeper are at stake and will be found to sustain the rules just declared: *Johnson v. Brewing Co.*, 75 N. J. Law, 282, 68 Atl. 85; *Timlan v. Dilworth*, 76 N. J. Law, 568, 71 Atl. 33; *Frank v. Conradi*, 50 N. J. Law, 23, 11 Atl. 480. In *DeMateo v. Perano*, 78 Atl. 162, evidence of the previous knowledge of the landlord of the defective condition of the roof leader in question was deemed in the opinion of this court to be an element essential to carry the case to the jury. In *Timlan v. Dilworth*, *supra*, the action was by the tenant against her landlord for the latter's negligence in not repairing a dumb waiter which fell and injured the tenant, and this court held that the landlord's failure to make an inspection for the purposes of discovery and remedy of the apparatus in question in the brief interim between the taking of title and the occurrence of the accident was not a failure to make an inspection within a reasonable time, and that to leave this question to the jury was error.

This case also holds that, when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts, what is a reasonable time for inspection is a question for the court, not for the jury. The following cases decided in other jurisdictions will be found to be pertinent: *Joshua v. Breithaupt*, 90 N. Y. Supp.

1053; *McCabe v. Kastens*, 11 Misc. Rep. 272, 32 N. Y. Supp. 249; *Henkel v. Murr*, 31 Hun (N. Y.) 28; *Idel v. Mitchell*, 158 N. Y. 134, 5 Am. Neg. Rep. 442, 52 N. E. 740. In *Tolland v. Paine Furniture Co.*, 175 Mass. 476, 7 Am. Neg. Rep. 260, 56 N. E. 608, the plaintiff was injured by falling downstairs in defendant's store, and the insistence under the evidence was that a mat at the top of the stairs, which was curled up at the end, caused her to trip and fall. The court held that the plaintiff had not sustained the burden of showing that the defect, if there was one, had existed so long before the accident that the defendant in the exercise of reasonable care ought to have known of it and remedied it.

The judgment below should be affirmed.

ROCAP v. BELL TELEPHONE CO.

[SUPREME COURT OF PENNSYLVANIA, MARCH 20, 1911.]

230 Pa. 597.

1. Telephones—Lightning—Negligence—Protection.

In an action against a telephone company to recover damages for personal injuries caused by an electric shock received while attempting to use a public telephone, the trial court should instruct the jury to find for the defendant, where it appears by plaintiff's testimony that he was shocked while attempting to use the telephone during a violent thunderstorm, and the uncontradicted proof shows that the best known device in general use for protecting persons against injury by abnormal or atmospherical electricity, had been placed on the telephone in question.

2. Telephones—Electrical Storms—Use—Warning.

A telephone company is not guilty of negligence in failing to place a notice on a public telephone warning against the use of the instrument during electrical storms, in absence of proof that such warnings have been adopted by other telephone companies.

Appeal by defendant from a judgment of the Court of Common Pleas of Philadelphia County, rendered in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by an electric shock received while attempting to use a public telephone. Reversed.

For appellant—Frank P. Pritchard and James W. Bayard.

For appellee—Simpson & Brown.

DECLARATION.

William H. Rocap, the above named plaintiff, claims to recover

CASE NOTE.

Injuries by Electric Shock While Using Telephone.

- I. CARE REQUIRED OF TELEPHONE COMPANY; LIABILITY, 675.
- II. TELEPHONE COMPANY AS AN INSURER, 680.
- III. CONTRIBUTORY NEGLIGENCE, 681.
- IV. INJURIES TO TELEPHONE OPERATOR, 683.
- V. LIABILITY OF CITY, 684.

I. Care Required of Telephone Company; Liability.

It is the duty of a telephone company to construct and maintain its appliances and equipment in the same manner that a careful and prudent man would adopt, and to do everything reasonably necessary to prevent accidents to its patrons by lightning; a failure to do this is negligence. *Rural Home Telephone Co. v. Arnold*,

from the defendant, The Bell Telephone Company of Philadelphia, the sum of \$20,000, which is justly due and payable by the said defendant to the said plaintiff upon a cause of action whereof the following is a statement:

The defendant is a corporation, owning and operating various lines of telephone throughout the State of Pennsylvania and owning and operating the pay stations in connection therewith, and is and was on the twenty-first day of June, A. D. 1906, the owner and operator of a certain telephone pay station at the Philadelphia Country Club, near Bala, and as the owner and operator of said pay station it was the duty of the defendant to have the same properly equipped and protected so as to prevent injury to persons while using the same. Notwithstanding its duty in this regard the defendant neglected to properly equip and operate its pay station at the said Philadelphia Country Club, and so negligently and carelessly maintained and operated the same, that on the twenty-first day of June, A. D., 1906, the plaintiff while using the telephone at the public pay station above referred to, at the Philadelphia Country Club, received a severe electrical shock, rendering him unconscious for sixteen hours, and totally disabling his left arm and permanently injuring the same and incapacitating him from business for a period of six weeks and permanently disabling him. Plaintiff further avers that he has suffered, and will continue to suffer for the balance of his natural life great pain and nervous shock and that his earning capacity has been permanently diminished by reason of the said shock and negligence of the defendant as above set forth and that he has been, and will be,

(Ky.), 119 S. W. 811 (1909); *Brucker v. Gainesboro Tel. Co.*, 125 Ky. 92 (1907); *Texas Telegraph & Telephone Co. v. Scott*, (Tex. Civ. App.), 127 S. W. 587 (1910), writ of error denied by Texas Supreme Court; *Delahunt v. United Telephone & Telegraph Co.*, 215 Pa. 241, 20 Am. Neg. Rep. 727, 114 Am. St. Rep. 958 (1906). "The duty it (the telephone company) owes to a customer using one of its instruments" (at a pay-station), said the court in *Brucker v. Gainesboro*, *supra*, "is not different from that due to their customers by other persons inviting the public upon their premises for the transaction of business."

Speaking on the subject of the degree of care which a telephone company is bound to exercise, the court in *Griffith v. New England Telephone & Telegraph Co.*, 72 Vt. 441, 52 L. R. A. 619 (1900), said: "Having undertaken to place and maintain the instrument in the house and connect it with its telephone line for the use of the deceased, in so doing it was under the duty to exercise the care of a prudent man under like circumstances. If, while in the exercise of such care, it had reasonable grounds to apprehend that lightning would be conducted over its wires to and into the house, and there do injury to persons

compelled to lay out and expend large sums of money for medicine and medical attendance and has suffered and will suffer for all time financial loss by reason of his inability to attend to business. Plaintiff further avers that his injuries are permanent and were in no way caused or contributed to by any act of his but were due entirely to the careless and negligent acts of the defendant.

Hence this suit.

PLEA.

The defendant interposed a plea of "Not Guilty."

MESTREZAT, J. The plaintiff is a newspaper reporter, and on the afternoon of June 21, 1906, went to the Philadelphia Country Club to report a polo match and remained to dinner that evening. At half past eight o'clock he left the dining room and went to the telephone booth in the building to communicate with his paper. The telephone was installed at the club house by the defendant company. As the plaintiff took the receiver from the hook and asked for the desired number, he received a shock and was severely injured. Alleging that his injuries were caused by the defendant's negligence, he brought this action to recover damages. The trial of the cause resulted in a verdict and judgment for the plaintiff. The defendant has appealed, and assigns for error the refusal of its motion for judgment *non obstante veredicto*.

It is averred in the statement, as the cause of action, that it was the duty of the defendant as owner and operator of the telephone pay

or property, and there were known devices for arresting or dividing such lightning so as to prevent injury therefrom to the house or persons therein, then it was the defendant's duty to exercise due care in selecting, placing, and maintaining, in connection with its wires and instruments, such known and approved appliances as were reasonably necessary to guard against accidents that might fairly be expected to occur from lightning when conducted to and into a house over its telephone wires."

A telephone company cannot escape liability on the plea that instrumentalities used for the protection of its patrons were the best the company

knew about, since, if there were better methods known to science which would give subscribers greater protection from electrical shocks, it must, in the exercise of reasonable care, select and use such methods. *Texas Telegraph & Telephone Co. v. Scott*, (Tex. Civ. App.), 127 S. W. 587 (1910).

The duty which a telephone company owes to its subscribers to make its service and lines reasonably safe for use, requires it to equip telephone instruments with "lightning arresters" with ground connection; and if a patron is injured through a failure to provide these appliances, the company must respond in damages. *Southern Telegraph and Telephone Co. v. Evans*,

station at the Country Club to have the same properly equipped and protected so as to prevent injury to persons using it, and that "the defendant neglected to properly equip and operate its pay station at the said Philadelphia Country Club, and so negligently maintained and operated the same, that on the twenty-first day of June, 1906, the plaintiff while using the telephone at the public pay station above referred to, * * * received a severe electrical shock rendering him unconscious," etc.

There were two witnesses called by the plaintiff, himself and Dr. Francis D. Patterson. In describing the accident the plaintiff testified that he went to the telephone booth, took the receiver off the hook, and asked for his number, "and instantly there was a heavy shock. I saw a flash of electricity and a bolt of fire in front of my face, and the next thing I remembered is the next afternoon my daughter sitting by my bedside in the Howard Hospital. * * * That was the first time I had regained my consciousness." As to the condition of the weather on the day of the accident, the witness says it looked threatening that afternoon and there was a rumbling of thunder all the latter part of the afternoon, that he was inside the clubhouse, "was not paying much attention to the surrounding elements," and did not know until the next day that a thunderstorm was going on at the time he went to the telephone.

Dr. Patterson testified that he was at the clubhouse that afternoon, and that it started to rain very hard early in the afternoon and there were distant flashes of lightning and thunder between half

54 Tex. Civ. App. 63 (1909). The installation of a "lightning arrester," without ground connection, is not a full performance of the company's reasonable obligation to its patrons. *Southwestern Telegraph & Telephone Co. v. Abeles*, 94 Ark. 254, 140 Am. St. Rep. 115 (1910).

And the fact that injury or death resulted from shock during an electric storm, will not relieve the telephone company from liability based on its failure to install a "lightning arrester" with ground connection, on the theory that the absence of such appliance was not the proximate cause of the injury or death. *Southern Telegraph & Telephone Co. v. Evans*, *su-*

pra; *Southwestern Telegraph & Telephone Co. v. Abeles*, *supra*.

In an action against a telephone company to recover damages for personal injuries to one by lightning, sustained while using a telephone in the usual way, the plaintiff who alleges that it was negligent for the telephone company either to attach the wire to a tree or to fail to have a ground wire, must show by expert evidence that the company was thus negligent, since the matter is not within the knowledge or experience of the jury. *Rural Home Telephone Co. v. Arnold*, (Ky.), 119 S. W. 811 (1909).

The fact that the electric current required for the use and operation of

past five and six o'clock. He says that later he was sitting at dinner on a covered veranda when a heavy storm came up. "I judge it was about a quarter after or twenty minutes after eight, suddenly there was a frightful, blinding flash of lightning—so much so that the people sitting at the same table with me all jumped up under the impression that the clubhouse had been struck, and, just as we started to go indoors, somebody came running out and said a man had been struck by lightning, and I went in right away and found Mr. Rocap lying on the floor and I then examined him and found that his condition was apparently very serious. * * * He was exactly like a man who had suffered concussion of the brain. * * * He was lying some twenty or twenty-five feet from the telephone booth just where he had fallen. * * * There was a blinding flash of light and the people at the tables, everybody on this veranda, forty or fifty people, jumped up and thought the clubhouse was struck. Q. And that was followed by a clap of thunder? A. Followed instantly—there didn't seem to be an appreciable space between the light and the thunder. Q. Were these such marks as would indicate that any of the current passed through him? A. The one on the front of the forehead was undoubtedly a bruise where he fell. What the one back of the ear was I am not prepared to state. It might have been an electric burn. It was due to a suffusion of blood. It might have come from a very severe bruise when he fell; I am not prepared to say that."

a telephone system is not sufficient to cause injury or death to any one who may intentionally, or by accident, come into contact with a telephone wire, will not relieve the telephone company from liability, where an accident results from its failure to keep its wires properly insulated or to maintain them at a safe distance from wires charged with a deadly current. It is, therefore, as much the duty of a telephone company to see that a dangerous current does not pass over its wires as to send only a harmless current from its exchange to operate the system. *Delahunt v. United Telephone & Telegraph Co.*, 215 Pa. 241, 20 Am. Neg. Rep. 727, 114 Am. St. Rep. 958 (1906). In this case it appeared that the father of the plaintiff had been a patron of the defendant

company and that for some time prior to his death his telephone had been disconnected. About three weeks before the accident which caused his death, deceased received a letter from the company stating that his 'phone would be "connected at the earliest possible moment." On the evening of the accident, a sound resembling the noise made by a cricket came from the direction of the telephone, and the deceased said "I believe that is the 'phone; I wonder if it is in use." Thereupon he got up, walked over to the instrument, and while standing upon a wet carpet took the metal transmitter down and was almost instantly killed by an electric shock. In an action against the telephone company to recover damages for such death, the court held that the case came within

The testimony of the plaintiff, it will be observed, was confined to showing the accident, the condition of the weather at the time he received his injuries, and, in rebuttal, that there was no sign on the telephone warning persons against using it during thunderstorms. The defendant company claimed that it had placed an instrument or device on the telephone at the clubhouse to prevent the discharge of electric currents during an electric storm into the telephone, and produced several witnesses having experience and technical knowledge who described the device and testified that it was a standard protection device and was at the time of the accident the best in general use and the most efficient known to the scientific world for protecting a telephone from outside or abnormal electrical disturbances, such as are due to lightning or to the telephone wire coming in contact with high voltage circuits. The witnesses, however, concurred in saying that there was no known device which would absolutely prevent lightning discharges into a telephone. It also appeared by uncontradicted evidence that the protection device on the telephone at the clubhouse was in proper working condition and had actually operated at the time of the accident.

The official records of the weather bureau at Philadelphia and the testimony of the observer in charge of the bureau show that there was a thunderstorm at Philadelphia during the evening of June 21, 1906, from 8:10 to 10:15 o'clock; and other testimony disclosed the fact that the storm was very severe and had put many telephones out of service.

the rule of *res ipsa loquitur*, and therefore the plaintiff was not required in the first instance to prove more than that deceased was killed by an electric shock in using the instrument which, with its connections, the defendant had furnished to him as one of its patrons.

And in *Lee v. Stillwater & M. St. R. Co.*, 140 App. Div. 779, 125 N. Y. Supp. 840 (1910), a telephone company was held liable for the death of a motorman who was killed by an electric shock by reason of the telephone wire sagging upon a feed wire of a power company, while he was using the railway company's box for the purpose of communicating with the superintendent.

II. Telephone Company as Insurer.

A telephone company is not an insurer against injuries from electric shocks. *Brucker v. Gainesboro Telephone Co.*, 125 Ky. 92 (1907); *Delahunt v. United Telephone Co.*, 215 Pa. 241, 20 Am. Neg. Rep. 727, 114 Am. St. Rep. 958 (1906). In the *Brucker* case it appeared that the plaintiff, who was a guest at a hotel, had occasion to use a telephone at a pay-station to talk to his wife at a distant place. As the telephone did not seem to work well, he took hold of the metal arm with his hand to raise the mouth piece, when he received a severe shock of electricity which threw him to the floor, rendering him unconscious and injuring his nerves. On the trial the

This, like any other case, must be considered and decided on the facts admitted or proved in the trial court. We have referred to the material evidence produced by both parties. The credibility of the witnesses was not impugned and the evidence was entirely uncontroverted. The facts, therefore, are not in dispute. We are all of the opinion that the learned trial judge erred in not giving binding instructions in favor of the defendant, and subsequently in not entering judgment for the defendant notwithstanding the verdict.

The basis of the plaintiff's action is negligence, and, as disclosed by the statement, it consists in the failure of the defendant company to properly equip, operate, maintain and protect its pay station at the clubhouse resulting in the plaintiff's injuries. It was incumbent on the plaintiff on the trial of the cause to establish the negligence averred in the statement before he was entitled to recover. His counsel now contend in support of the judgment entered in his favor by the court below, that the maxim *res ipsa loquitur*, applies; that the plaintiff made out a *prima facie* case and the defendant failed to offer any evidence which shifted the burden of proof; and that the defendant company's failure to place a warning on the telephone against its use during electrical storms was evidence tending to establish the company's negligence.

The maxim *res ipsa loquitur* does not apply to the facts of the case as disclosed by the plaintiff's evidence. We are not required to determine whether the maxim would have applied had the plaintiff's

telephone company showed that the instrument had been examined by one of its men within 10 minutes after the accident and was found to be all right. It had not been out of order before and the cause of the accident was entirely unexplained. There was no storm at the time, but a high wind was blowing. An electric light was burning in the booth and an electric light company had its wires throughout the hotel and town. The plaintiff asked the court on the trial to instruct the jury "that it was defendant's duty to so maintain its wires and appliances at its pay station as to protect from danger, those who used them, and that, if it failed to do this and Brucker (plaintiff) was

injured by reason of the appliances not being free from danger, they should find for him." The court refused this instruction, but directed the jury to find for plaintiff if they believed from the evidence that the defendant carelessly or negligently failed to protect its wires or appliances. A finding for the defendant was affirmed on appeal.

III. Contributory Negligence.

A person who deliberately places himself in a position to receive an electric current, cannot recover damages for injuries sustained, though the existence of the current was due to the negligence of the telephone company. Thus, a night gate operator who "monkeyed" with a "block signal

evidence concluded by showing simply the accident, that he had approached the telephone, took the receiver and instantly received the electric shock which caused his injuries. It might be that as the telephone line and the electric current used in operating it were in the exclusive control and management of the defendant company, and the result was so unusual and out of the ordinary in operating telephones that a fair inference might be drawn that the shock communicated to the plaintiff was caused by the defendant's negligent operation or management of its line. It possibly could have been inferred under these circumstances, though we do not decide, that the telephonic wire had come into contact with a highly charged wire by reason of the negligent construction or maintenance of the former wire and thereby produced the electrical discharge that shocked the plaintiff. The proof of the accident and the consequent injury without more might have made out a *prima facie* case and sent it to the jury. But the plaintiff went beyond the mere proof of the accident, and showed the cause of it. His evidence left no reasonable ground for an inference that the accident resulted from the defendant's negligence or improper operation or management of its line. It pointed conclusively to one cause, if the telephone had any connection with his injuries, and that was the act of God. The testimony of Dr. Patterson, the plaintiff's witness, leaves no rational doubt that the shock received by the plaintiff, if communicated by the telephone, was produced by atmospheric electricity and not by an electric current with-

telephone box" in a railroad watch tower, knowing that the wire connecting with the box was lying across a live electric light wire and that the box was charged with electricity, is guilty of contributory negligence and no recovery can be had for his death. *Citizens' Telephone Co. v. Westcott*, 124 Ky. 684 (1907).

Contributory negligence is not shown by the act of a subscriber in taking hold of the metal transmitter of the instrument, while standing on a wet carpet, at a time when there is no storm and there is nothing to indicate that the transmitter is charged with a deadly current of electricity. *Delahunt v. United Telephone & Telegraph Co.*, 215 Pa. 241, 20 Am. Neg. Rep. 727, 114 Am. St. Rep. 958 (1906).

The fact that an electrical storm is in progress at some distance from a dwelling, does not make one guilty of contributory negligence who was injured by lightning while using a telephone in his house in the ordinary and usual way. *Rural Home Telephone Co. v. Arnold*, (Ky.), 119 S. W. 811 (1909); *Southwestern Telegraph & Telephone Co. v. Abeles*, 94 Ark. 254, 140 Am. St. Rep. 115 (1910).

An employee of a subscriber whose duty it was to answer telephone calls, is not chargeable with negligence in placing the receiver to his ear in the usual way in answer to a call, although there had been April showers throughout the day, accompanied by the usual flashings of lightning, where the storm in the vicinity of the place where he

in the control of man. Such being the only reasonable inference to be drawn by the evidence, and; that, therefore, there was another cause than the defendant's negligence which, at least, may have produced the plaintiff's injuries, the rule *res ipsa loquitur* cannot be applied: *East End Oil Co. v. Penn. Torpedo Co.*, 190 Pa. 350, 42 Atl. 707; *Allen v. Kingston Coal Co.*, 212 Pa. 54, 20 Am. Neg. Rep. 64, 61 Atl. 572.

It appearing by the plaintiff's testimony that his injuries resulted from an act of God, the maxim has no application, and a presumption of negligence does not arise. *Actus Dei nemini facit injuriam*. The burden was therefore on the plaintiff to produce affirmative proof of negligence which concurred with the act and effectively contributed to the accident. To create a liability on the part of the defendant, it must have required the combined effect of the act of God and the concurring negligence to produce the injury: *Balt. & Ohio R. Co. v. School District*, 96 Pa. 65, 42 Am. Rep. 529. And, if the act was so overwhelming as of its own force to produce the injury independently of the negligence shown, the defendant cannot be held responsible: *Hebling v. Allegheny Cemetery Co.*, 201 Pa. 171, 15 Am. Neg. Rep. 151, 50 Atl. 970.

We have discussed the evidence introduced by the plaintiff and its effect on the liability of the defendant. There was no attempt by the plaintiff to show that there was any defect whatever in the telephone, and he relied solely on the proof of the accident and his injuries to show that the telephone was not properly constructed,

was using the telephone had ceased. *Southwestern Telegraph & Telephone Co. v. Abeles*, 94 Ark. 254, 140 Am. St. Rep. 115 (1910).

IV. Injuries to Telephone Operator.

In the case of injuries to a telephone operator in the service of the company, the doctrine of assumption of risk or duty to furnish a safe place to work may be applicable. *Cahill v. New England Telegraph & Telephone Co.*, 193 Mass. 415 (1907). This was an action for tort for personal injuries received by plaintiff while at work in the employment of the defendant as a toll operator at its telephone exchange. The plaintiff alleged that the

defendant negligently failed to furnish a safe and suitable place in which to perform her work, and also failed to maintain its wires, appliances and apparatus in proper condition, but had carelessly allowed them to become defective, whereby she was injured by receiving a severe shock of electricity while in the performance of her duties. There was evidence that on the night before and on the morning of the accident, the plaintiff had reported to the chief operator that she had received strange sensations while at work, which caused "a jarring and a grinding or rumbling in her ears." It was shown that a buzzing of the instruments and slight shocks were not

equipped or protected. He therefore failed to meet the burden imposed upon him by showing that any negligent act of omission or commission on the part of the defendant company produced or contributed in any way to his injuries. On the other hand, the defendant proved by witnesses, experienced and skilled in the use of electricity and electrical apparatus, that the telephone at the clubhouse was not defective but was in good condition, and that the best known device in general use for protecting persons against injury by abnormal or atmospheric electricity was placed on this telephone. This evidence was not contradicted or impugned in any way. The plaintiff made no attempt to meet or discredit it. It therefore appears not only that the plaintiff wholly failed to support the allegations of negligence in his statement, but that the defendant company clearly established that at the time of the accident the telephone was properly equipped, operated and protected. This fully met the duty imposed by law on the defendant in the operation of its telephone line.

It is contended by the plaintiff that the failure of the defendant company to place a warning on the telephone against its use during electrical storms was evidence to submit to the jury of the defendant's negligence in the management and operation of the telephone. We do not regard this contention as tenable. It overlooks the well settled and oft-repeated rule in this State that the test of negligence in methods, machinery and appliances is the ordinary usage of the business. One cannot be convicted of negligence if he employs in his business the methods and appliances in general use by those en-

uncommon or dangerous. Upon receiving a call on the day in question in which she heard the number desired, she suddenly received a shock of dangerous severity, which would not have happened if the apparatus had not been defective. The court held that if the shock was caused either by a want of repair or a proper adjustment of the apparatus, the question of the defendant's negligence was for the jury to determine; the question of plaintiff's assumption of risk was also held to be a matter for the jury.

V. Liability of City.

A city which maintains electric light

wires over its streets near numerous telephone wires, and permits the escape of electricity to telephone wires strung by a railroad company operating a railroad through the city, is liable, having knowledge of the existing conditions, for the death of an employee of the railroad company which was caused by an electric shock received while he was attempting to use the telephone line in the discharge of his duties as such employee, although the company's failure properly to guard its wires from contact with the electric light wires concurred in producing death. The contention of the defendant that it did not owe the employee of the railroad company the

gaged in a like business; on the other hand, if he fails to use such methods and appliances and an injury results therefrom, he may be required to convince a jury that his methods and appliances were of equal or superior merit to those in general use. If a notice or warning not to use the telephone during a thunderstorm can be regarded as an appliance or equipment, it does not appear, and the plaintiff does not attempt to show that such a notice has ever been placed by the defendant or any other company on its telephones. It may be common knowledge, possessed alike by the plaintiff and the public, that it is dangerous to use or be near a telephone or any other good conductor of electricity during a thunderstorm; but it is equally well known and the contrary is not disclosed by the evidence in this case, that telephone companies do not ordinarily place signs on their telephones containing such information. If, however, a danger warning had been placed on this telephone, it would not have afforded the plaintiff any protection. He testified that he was inside the clubhouse during the evening, that the weather was not of any concern to him, and that he did not know a thunderstorm was in progress at the time of the accident. It is manifest, therefore, that such a notice would not have deterred the plaintiff from using the telephone, and thereby protected him against the electric shock which he received.

The doctrine of the electric light and power cases cited by the plaintiff is not applicable to the facts of the present case. In those cases it appeared the injury was caused by an electric current which was or should have been under the control of the defendant, and the exercise of proper care by him would have prevented the accident. Here, the undisputed testimony shows that the plaintiff was injured by a current of atmospheric electricity or lightning against which there is no absolute protection, but against which the defendant company tried to protect the plaintiff and others using the telephone by placing on it the best and most efficient protection device then known. The distinction between the two classes of cases is, we think, apparent, and certainly very important. The defendant company neglected no duty which the law imposed, and hence it is not responsible for the injury which befell the plaintiff.

The facts of this case are not in dispute and they fail to show any

duty of furnishing him a safe place to work, was held not to change the city's duty to the public to use care in controlling the dangerous current which its wires carried, and that deceased's relation to the railroad com-

pany did not deprive him of that protection, or relieve the city from liability if the performance of that duty was neglected. *City of Logansport v. Smith*, — Ind. App. —, 93 N. E. 553 (1911).

negligence on the part of the defendant company which caused the plaintiff's injuries. The learned trial judge should therefore have directed a verdict for the defendant, or subsequently entered judgment for the defendant notwithstanding the verdict.

The assignment of error is sustained and the judgment is reversed, and judgment is now entered for the defendant, *non obstante veredicto*.

STACK v. EAST ST. LOUIS & SUBURBAN RAILWAY CO.

[SUPREME COURT OF ILLINOIS, JUNE 29, 1910.]

245 ILL. 308.

1. Negligent Death—Burden of Proof.

In an action for damages for the death of one who had stepped from one street car and was killed by another car going in the opposite direction, the burden of proof is upon the plaintiff to show that the deceased was exercising ordinary care at the time of the accident, to be determined as a fact from the circumstances surrounding the event.

2. Street Railroads—Injury—Care Required of One Who Had Alighted.

A person who alighted from one street car and after passing around the rear of such car was killed by another car going in the opposite direction from the one from which he had alighted, is only bound to exercise reasonable care under all of the circumstances to avoid injury by the approaching car.

3. Street Railroads—Confusion—Contributory Negligence.

A person cannot be chargeable with contributory negligence, if, upon passing around the rear of a street car from which he had just alighted he is confronted by imminent danger from another car going in the opposite direction, and in confusion does nothing or takes a step or two in the wrong direction and as a result is struck by the car.

4. Street Railroads—Excessive Speed—Care Required.

Negligence in running a street car at an excessive rate of speed without sounding a gong, past another car which had stopped at a crossing to permit passengers to alight, will not relieve one who was passing around the rear of the car from which he had just alighted, from the necessity of exercising care for his own safety, but such negligence may be considered in determining whether his conduct was such as an ordinarily prudent man might have adopted under similar circumstances.

Appeal by defendant from a judgment of the Circuit Court of St. Clair County, rendered in favor of plaintiff, as administratrix in an action brought to recover damages for the alleged negligent death of her husband who was struck by a street car. **Affirmed.**

NOTE.

On the subject of Injuries to Persons Struck by Street Cars After Appearing From Behind Other Cars, see note in 20 Am. Neg. Rep. 590.

And on the subject of Liability for Injury to Persons Alighting From Street Cars and Trains, see notes in 7 Am. Neg. Rep. 367; 9 Am. Neg. Rep. 17, 572; 14 Am. Neg. Rep. 325, 334;

and 21 Am. Neg. Rep. 604.

And on the subject of Alighting From Cars, generally, see Vols. 2-7 Am. Neg. Cas., where the "Alighting and Boarding Cars," from the earliest period to 1896, decided in the States and Territories and the Federal and Supreme Courts of the United States, are reported and classified and arranged in alphabetical order of States

For appellant—Schaefer, Farmer & Kruger.

For appellee—M. V. Joyce, and D. J. Sullivan.

DECLARATION.

Julia Stack, administratrix of the estate of John Stack, deceased, plaintiff, by Maurice V. Joyce and Keefe & Sullivan, her attorneys, complains of the East St. Louis and Suburban Railway Company, a corporation, defendant, of a plea of trespass on the case:

For that whereas, the defendant, on the 11th day of May, A. D., 1907, and for a long time prior thereto, was possessed of and operating a certain line of railroad extending from the city of East St. Louis to the city of Belleville, in said county, and was possessed of and operating on its said line of road certain electric cars for the transportation of passengers for hire; that defendant's said line of road was connected with the track of the East St. Louis Railway Company, a street railway corporation having tracks laid upon certain streets of the city of East St. Louis, and along and upon State Street, in said city; that defendant was, on the date aforesaid, running its passenger cars on its line, aforesaid, and from its line aforesaid, over the tracks of the East St. Louis Railway Company upon State Street in the city of East St. Louis; that on the date aforesaid the plaintiff's intestate became a passenger on one of defendant's cars, at or about Twenty-sixth Street in the city of East St. Louis, to be conveyed in said car, as such passenger, to Sixteenth Street, in the city of East St. Louis, his destination; that Sixteenth Street is one of the public streets of the city of East St. Louis, and crosses State Street at right angles; that when the car on which plaintiff's intestate became such passenger, crossed Sixteenth Street, it stopped to allow plaintiff's intestate, and other passengers, to alight therefrom, that being one of its usual and customary places to allow passengers to get on and off its cars; that at that point on State Street there is a double track, the northerly of which is used by the west-bound cars of the defendant, and the southerly of which is used by the east-bound cars of the defendant.

It, therefore, became and was the duty of the defendant to use reasonable care in the operation and control of its cars going in the opposite direction upon the adjacent track, while passengers were alighting from the car in question, to avoid unnecessarily injuring passengers after alighting and while yet lawfully upon the street; but the defendant not regarding its duty in that behalf, so negligently managed one of its east-bound cars upon the adjacent track, afore-

said, by running the same at a high rate of speed past the car from which passengers were alighting, without ringing a bell or sounding a gong and without having said car under proper control, that the east-bound car was thereby negligently driven upon and against plaintiff's intestate, while he, in the exercise of due care and caution for his own safety, was attempting to cross said east-bound track, after alighting from the car aforesaid, upon the said crossing of Sixteenth Street and State Street, in said city, whereby plaintiff's intestate was instantly killed.

And for that whereas, also, the defendant, on the 11th day of May, A. D., 1907, and for a long time prior thereto, was a corporation, organized under the Railroad Act of the State of Illinois, and was possessed of and operating a certain line of railroad, extending from the city of East St. Louis, in the county of St. Clair and State of Illinois, to the city of Belleville, in said county and state, and was possessed of and operating upon its said line of railroad certain electric cars used for the transportation of passengers for hire; that at the westerly terminus of its said line of railway its tracks were connected with the tracks of the East St. Louis Company, a street railway corporation, having a line of double tracks upon State Street, one of the public streets of the city of East St. Louis, the northerly track of which was used for west-bound cars, and the southerly track of which was used for east-bound cars; that on the date aforesaid the defendant was running its cars over the said tracks of the East St. Louis Railway Company, upon State Street in the city of East St. Louis; that on the date aforesaid there was in force in the city of East St. Louis an ordinance regulating the speed of any train, locomotive engine, or car, operated by any railroad corporation, within the corporate limits of the city, as follows: "No railroad company or conductor, engineer, or other employee of such company, managing or controlling any locomotive engine, car, or train, upon any railroad track, shall run, or permit to be run, within the limits of said city, any passenger train or car at a greater rate of speed than ten miles per hour, under a penalty, in either case, of not less than twenty dollars nor more than one hundred dollars."

It, therefore, became and was the duty of the defendant in operating its cars along and upon State Street, in the city of East St. Louis, to comply with the foregoing ordinance, and not to run its passenger cars at a higher rate of speed than ten miles per hour; yet the defendant, not regarding its duty in that behalf, on the date aforesaid, negligently ran one of its east-bound cars along and upon State Street, in said city, and over the crossing of Sixteenth Street, also a

public street of the city of East St. Louis, at a high and dangerous rate of speed, to-wit, at the rate of twenty miles per hour; by reason whereof the said car was driven up and against plaintiff's intestate, while he, in the exercise of due care and caution for his own safety, having just alighted from one of defendant's west-bound cars, which was still standing at the crossing of Sixteenth Street and State Street, in said city, for passengers to alight, was attempting to cross over the east-bound track, upon the crossing aforesaid; whereby plaintiff's intestate was struck by an east-bound car and instantly killed.

And for that whereas, also, the defendant, on the 11th day of May, A. D., 1907, was a corporation organized under the Railroad Act of the State of Illinois, and was possessed of and operating a certain line of railroad extending from the city of East St. Louis, in the county of St. Clair, and State of Illinois, to the city of Belleville, in said county and State, and was possessed and operating upon its said line of railroad certain electric cars used for the transportation of passengers for hire; that at the westerly terminus of its said line of railway its tracks were connected with the tracks of the East St. Louis Railway Company, a street railway corporation, having a double line of tracks upon one of the public streets of the city of East St. Louis, called State Street, the northerly track of which was used for west-bound cars, and the southerly track of which was used for east-bound cars.

And plaintiff avers that on the date aforesaid the defendant was wrongfully, unlawfully, and without legal authority, running its cars over the tracks of the East St. Louis Railway Company, aforesaid, upon State Street; and plaintiff avers that on the date aforesaid, while her intestate was crossing State Street at its intersection with Sixteenth Street, in said city of St. Louis, both of said streets being public streets in said city, and while her intestate was in the exercise of due care and caution for his own safety, one of defendant's east-bound cars, so wrongfully and without legal authority being, by the defendant, driven along and upon the tracks of the East St. Louis Railway Company, on said State Street, at the crossing aforesaid, was driven upon and against plaintiff's intestate; whereby he was instantly killed.

And plaintiff avers that her intestate left surviving him, Julia Stack, his widow, and John Stack and Maurice Stack, his children, and only heirs at law. And plaintiff avers that by reason of the premises, aforesaid, she has sustained loss and damage, for the use of said next of kin, in the sum of ten thousand dollars, and therefore she brings this suit, etc.

DUNN, J. The appellee recovered a judgment against the appellant for causing the death of her intestate, John Stack, and the judgment has been affirmed by the Appellate Court. The errors assigned question the action of the trial court in refusing to instruct the jury to find the defendant not guilty and in refusing one other instruction.

The deceased alighted from the rear platform of an interurban car going west on State street, in the city of East St. Louis, which had stopped at the west side of Sixteenth street. As he passed around the rear end of the car to go to the south side of State street he was struck and killed by an east-bound car. The negligence charged in the declaration was running the car past the standing car at a high rate of speed in excess of the rate limited by an ordinance of the city, without ringing a bell or sounding a gong, and without having the car under proper control, and without having it equipped with a fender in a reasonably safe condition. There was evidence tending to prove the negligence charged, and it is not contended that the judgment of the Appellate Court is not conclusive against appellant on this question. It is, however, insisted that there is no evidence in the record that the deceased was in the exercise of ordinary care for his own safety.

The burden of proof is always on the plaintiff, in actions of this character, to show that the deceased was in the exercise of ordinary care at the time he was injured, and this question is always one of fact, to be determined by the circumstances attending the event. Whether the evidence tends to prove such care is a question of law, which a court can determine adversely to the plaintiff only when no other conclusion can reasonably be drawn from uncontradicted facts and from the evidence favorable to the plaintiff. There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety of circumstances which constantly arise it is impossible to announce such a rule. The only requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do under like circumstances. Courts can lay down no precise rule of action to be observed by a man who, passing behind a street car finds himself suddenly confronted, without warning, by a rapidly moving car or other vehicle. If, momentarily paralyzed or confused by the imminent danger, he does nothing, or takes a step or two in the wrong direction and a collision results, it cannot be said, as a matter of law, that he acted in a manner different from that which might have been expected from a man of ordinary

prudence. It is not an extremely unusual situation, and each case, as it arises, must be determined upon its own facts. There was evidence in this case that the car which struck the deceased was running at a rate of speed greatly in excess of the 10 miles an hour limited by the ordinance; that the gong was not sounded within 50 or 60 feet of the crossing where the deceased was struck; and that the east-bound car was within two or three feet of him as he came from behind the west-bound car. It was possible for him, by the exercise of a sufficiently high degree of care, to have discovered the east-bound car and not have got in its way. He had, however, a right to rely upon his sense of hearing as well as of sight, and to expect the appellant, in running its car past another car stopped for the discharge of passengers, to give warning and to observe the ordinance of the city in respect to speed. While the negligence of the appellant did not relieve the deceased from the necessity of exercising care for his own safety, it is to be considered in determining whether his conduct was such as an ordinarily prudent man might have adopted under the circumstances, and that question was properly submitted to the jury.

Complaint is made of the refusal of the court to give to the jury the following instruction which was asked on behalf of appellant: "The court instructs the jury that if you believe, from the evidence, under the instructions of the court, that the degree of care required of the said John Stack for his own safety, as defined in these instructions, required him, before crossing said track, to look and ascertain whether the track was clear or whether a car was approaching, and if the jury believe, from the evidence, under the instructions of the court, that the said John Stack, by the exercise of such care would have looked and ascertained whether the track was clear and whether or not a car was approaching, and if the jury further believe, from the evidence, under the instructions of the court, that the said John Stack did not so look and ascertain whether the track was clear and whether or not a car was approaching, and that he was killed in consequence of his failure to so look and ascertain, if he did so fail, then the court instructs the jury to find the defendant, East St. Louis & Suburban Railway Company, not guilty."

This instruction authorized the jury to find that the degree of care required of the deceased for his own safety required him, before crossing the track, not only to look, but to ascertain whether the track was clear or a car was approaching. In other instructions the court had told the jury, in accordance with the correct rule, that it was the duty of a person about to cross a street railway track to use

reasonable care to ascertain whether there was an approaching car, and that neglect to do so would preclude a recovery. This instruction, however, went beyond that proposition, and authorized the jury to find that the deceased must not only use reasonable care, but must, at his peril, ascertain the fact. Ordinary care to ascertain the fact was all that was required of the deceased, and the instruction was objectionable because it permitted the jury to find that more was required. In *Chicago City Ry. Co. v. O'Donnell*, 208 Ill. 267, 70 N. E. 294, 477, the refusal of an instruction somewhat similar to that now under consideration was held erroneous. That instruction, however, submitted to the jury the question whether the deceased, if he had looked, could by the exercise of ordinary care have ascertained whether or not a car was approaching. The instruction now under consideration does not submit this question, which was necessary to be decided in determining whether the deceased had exercised due care.

The judgment of the Appellate Court is affirmed.

AKIN v. LEE.

[COURT OF APPEALS OF NEW YORK, JUNE 11, 1912.]

206 N. Y. 20.

Automobiles—Negligence—Personal Injuries—Proof of Insurance.

In an action brought to recover damages for personal injuries sustained by a child in consequence of the careless operation of an automobile, it is reversible error to permit the plaintiff to adduce evidence before the jury to show that the defendant was insured against accidents.

Appeal by defendant, William A. Lee, from a judgment of the Appellate Division, which affirmed a judgment entered upon a verdict in an action brought by Paul Akin to recover damages for personal injuries caused by the careless operation of an automobile. Reversed.

For appellant—Frank R. Keeshan.

For respondent—John T. Norton.

GRAY, J. The plaintiff, a lad of 12 years of age, was run into and injured by the defendant's automobile and this action for damages is upon the ground that the automobile was being carelessly operated by the defendant's chauffeur. The plaintiff had a verdict and the judgment entered thereon has been affirmed at the Appellate Division by a unanimous vote. Leave was given to the defendant to appeal to this court, and the error assigned by the appellant, and which survives the unanimous affirmance, is in the denial by the trial court of the defendant's motions to strike out statements to the effect that the defendant was insured. The father of the plaintiff, being examined as a witness in plaintiff's behalf, was asked to state a conversation that took place between him and the defendant. The witness told of the interview, and, among other things stated that the defendant had said that it was his car, that his chauffeur had told

NOTE.

On the subject of Personal Injuries Sustained by Being Struck by Automobiles, see the cases reported in Vols. 1-21 Am. Neg. Rep., Current Series (1897-1909).

And see LINDSAY v. CECCHI (Del. 1911), reported in this volume (1 N. C. C. A.), p. 80, *ante*; SHEBOR v. BARBOUR (Ala. 1912), reported in this volume (1 N. C. C. A.), p. 120, *ante*; and HARTLEY v. MILLER (Mich. 1911), reported in this volume (1 N. C. C. A.), p. 126, *ante*.

him about the accident and that he was insured. Upon his making this last statement the defendant's counsel asked the court to strike it out as improper. The court ruled that the witness was entitled to state the conversation between him and the defendant, and an exception was taken. At another time, when the defendant was a witness in his own behalf, upon his cross-examination by the plaintiff's counsel, he was asked about his conversation with the plaintiff's family and this question was asked of him: "You told Mr. Akin that you were insured against such accidents, didn't you?" The witness answered: "Why, I did after I tried to straighten the case myself with them; after she said they were going to the full extent of the law—." At this point the defendant's counsel interrupted the witness by an objection and asked "to have the answer stricken out, until I get in the objection on the ground that it is incompetent, improper and immaterial." The court again ruled that if it was part of the conversation the witness might answer, and an exception was taken.

If we might admit a doubt as to the first ruling, the error in the second is too serious to be disregarded. We have but recently held, following a rule already laid down by us, that evidence that the defendant in an action for negligence is insured in a casualty company is incompetent and its admission justifies an order for a new trial of the action. See *Simpson v. Foundation Co.*, 201 N. Y. 479, 490, 95 N. E. 10. Such evidence almost always is quite necessary to the plaintiff's case and its effect cannot but be highly dangerous to the defendant's; for it conveys the insidious suggestion to the jurors that the amount of their verdict for the plaintiff is immaterial to the defendant. It was a highly improper attempt on the plaintiff's part to inject a foreign element of fact into his case which might affect the jurors' minds, if in doubt upon the merits, by the consideration that the judgment would be paid by an insurance company. While frequently in the exercise of the authority conferred upon this court we disregard technical errors when we see that they do not affect the merits of the controversy, the error committed in this case is of too grave a nature to be put aside as merely technical. In repeated instances judgments have been reversed for its commission, and counsel must take notice that we shall adhere to our rule and that we shall order a new trial in all cases, where, in such actions, a verdict may have been influenced by the consideration of such unauthorized evidence.

The argument that the evidence was competent upon the question of the ownership of the automobile is without weight. While it is

true that the allegation in the complaint of the defendant's ownership of the automobile may have been put in issue by the form of the answer, at the trial, it was proved and the defendant did not deny it. The application to the Secretary of State for registration of the automobile showed the defendant to be its owner. The plaintiff's witness, when testifying to the conversation with the defendant, stated that the latter admitted his ownership of the car. No question was raised as to its ownership on the defendant's motion to dismiss the complaint. The chauffeur, when examined as a witness, testified that at the time of the occurrence he was operating the defendant's car, and the defendant upon his own examination had raised no such question.

We think that the judgment should be reversed, and that a new trial of the action should be had, with costs to abide the event.

CULLEN, C. J., HAIGHT, VANN and WERNER, JJ., concur; WILLARD BARTLETT, J., dissents; CHASE, J., dissents on the ground that upon all the facts shown by the record in this case the rulings of the court mentioned do not require a reversal of the judgment.

Judgment reversed, etc.

WICHERS v. NEW ORLEANS ACID & FERTILIZER CO.

[SUPREME COURT OF LOUISIANA, MAY 22, 1911.]

128 La. 1011.

1. Evidence—Burden of Proof.

The burden of proof is on the plaintiff in an ordinary suit for damages.

2. Nuisance—Fumes—Destruction of Plants.

A plaintiff sustains the burden of proof when he shows that at the time his plants were destroyed and damage suffered, the defendant's factory was freely emitting fumes, gases, and acids, which are destructive of plant life, and that the wind was blowing the fume, etc., towards his premises, some 900 feet distant, and that there was no other known agency of destruction existing in the vicinity.

[Headnotes by the Court.]

Appeal by defendant from a judgment of the Civil District Court, Parish of Orleans, rendered in favor of plaintiff in an action brought to recover damages for the destruction of plants by fumes. Affirmed.

For appellant—T. M. & J. D. Miller.

For appellee—Robert O'Connor.

PETITION.

The petition of Benedict M. Wichers, a resident of the Parish of Jefferson, State of Louisiana. With respect represents:

That the New Orleans Acid & Fertilizer Company, a corporation

CASE NOTE.**Injury to Plants and Trees by Fumes or Gases.****I. IN GENERAL, 697.****II. INJUNCTION, 702.****I. In General.**

On the theory that if one uses his own property for the prosecution of some business in such a way as to inflict injury upon the property of his neighbor, he is liable for resulting damages, it has been held that a fertilizer company is liable for the destruction of vegetation and crops by

the escape of sulphuric acid gas or fumes from its plant. *Frost v. Berkeley Phosphate Co.*, 42 S. C. 402, 26 L. E. A. 693, 46 Am. St. Rep. 736 (1894).

The right to recover damages for injuries to fruit trees and vegetables by destructive vapors, gases and fumes which were permitted to escape from defendant's brick plant, was sustained in *Hinmon v. Somers Brick Co.*, 75 N. J. L. 869 (1908). "One who operates a manufacturing plant liable to give off destructive fumes that will injure his neighbor's herbage must," said the court, "so use it as not to

chartered under the laws of the State of ———, and doing a business in this Parish, and having an agent to receive service of process, and stand in judgment, is truly and justly indebted unto your petitioner in the full sum of fifteen thousand six hundred and fifteen, 50-100 dollars, (\$15,615.50) for damages, for this to-wit:—That your petitioner is the owner of certain real estate, situated on the corner of Fourth and Cuivier Streets, in square bounded by Fifth Street, and Copernicus Avenue, in the town of Gretna, Parish of Jefferson; that he has his home and resides with his family on said premises, and has been there for many years; that he is engaged in the business of florist and nursery-man, which business he operates at that place, and from which he obtains a livelihood.

That petitioner is thoroughly competent in his said business, and through his knowledge, and efforts, and with the assistance of his family, he raises large and valuable crops of ferns, flowers, and the various varieties of green house, and exotic plants; that on or about the first day of October, 1908, he had a very valuable collection of said plants and flowers, almost mature and ready to be sold and shipped; that on or about the said day, his said crop, including practically all of his valuable plants, were totally destroyed, or so badly injured, as to render them valueless and useless; that many of the others which he attempted to use and ship to his customers, were so

occasion unnecessary damage; and the permitting of such gas to escape in quantities sufficient to do such injury is of itself negligence which results in a nuisance."

One who manufactures brick upon his own land, using a process of burning by which noxious gases are generated, and which are carried by the winds upon adjoining lands, thereby injuring and destroying trees and vegetation growing thereon, is guilty of maintaining a nuisance and the party injured is entitled to bring an action to recover damages and to restrain the use of such process. "It is a general rule," said the court, "that every person may exercise exclusive dominion over his own property, and subject it to such uses as will subserve his private interests. Generally, no other person can say how

he shall use or what he shall do with his property. But this general right of property has its exceptions and qualifications. *Sic utere tuo ut alienum non laedas* is an old maxim which has a broad application. * * * The plaintiffs had built a costly mansion and had laid out their grounds and planted them with ornamental trees and vines, for their comfort and enjoyment. How can one be compensated in damages for the destruction of his ornamental trees, and the flowers and vines which surrounded his home? How can a jury estimate their value in dollars and cents? The fact that trees and vines are for ornament or luxury entitles them no less to the protection of the law. Every one has the right to surround himself with articles of luxury, and he will be no less protected than one who provides

badly injured, as to cause great dissatisfaction, and caused him loss of business, money and time.

That beside the destruction of his said nursery and plants, his property situated on above premises was otherwise injured.

That all of the above injury to his property, and injury to and destruction of his said plants, etc., was caused by the plant owned and operated by the defendant company, in the town of Gretna.

That noxious and disagreeable odors, and vapors, gases, dust, steam, smoke and acid fumes, etc., escape from the said plant, and fill the surrounding atmosphere, and that all of the said injury and destruction of his property as has been set forth, was directly due to, and entirely caused by the said plant, and the said vapors, acid fumes, gases, etc.

That the said plant is a *prima facie* nuisance, a nuisance *per se*, a public and private nuisance, because of its location which is in a thickly populated residential district, and is a greater nuisance, because of the manner it is operated and conducted, and because of the negligence and want of care and skill of its owners, the defendant company, and their agents and employees.

That the said plant and its manner of operation, and the negligence of its owners and employees in permitting the said vapors, noxious odors, fumes, smoke, dust, etc., to escape, causes great injury

himself only with articles of necessity. The law will protect a flower and a vine as well as an oak. These damages are irreparable too, because the trees and vines cannot be replaced, and the law will not compel a person to take money rather than the objects of beauty and utility which he places around his dwelling to gratify his taste or to promote his comfort and health." *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567 (1876).

In an action to recover damages for the destruction of a farm for agricultural and fruit raising purposes, it is proper to deny a nonsuit where the evidence shows that a smelter, from which destructive fumes arose, was located about a mile from the land in question, that the fruit trees on such land were in a thrifty condition in the year of 1898, but in the spring

of 1900 after the fumes from the smelter hung for several hours in the atmosphere, the blossoms on the trees became blighted and fruit did not form, that the leaves had a brown, cooked appearance and that the alfalfa appeared bleached, that no fruit was gathered from the orchard in 1900 and the strawberry crop was greatly damaged in that year, that similar conditions were noticed in the year 1899, but the injury was not so marked as during the succeeding year, and that, as shown by expert testimony, the presence of sulphuric acid released in the atmosphere by the roasting of ores would produce injurious effects on vegetation, and that that condition would ultimately destroy vegetation. The injurious results were the necessary consequence which arose from the character of the ore smeltered and the

to the property of all the residents of the immediate neighborhood, and depreciates the value of real estate in its vicinity, including that of petitioner, and at times becomes such a nuisance, as to render living in the neighborhood almost impossible.

Petitioner avers that the said plant can be operated with more care, and thereby cause less injury to property, and further believes and charges that at the period above stated, on or about the first day of October, 1908, the said plant was not in first class condition, and was operated with greater negligence than usual, by the said defendant company, and its agents and employees, and that the complete destruction of his property as above described, might have been averted by the exercise of proper care on the part of said defendant company.

Petitioner avers that his loss, as above stated, amounts to the following:

(1) Injury to and destruction of plants, ferns and flowers, as per itemized statement annexed, the sum of four thousand six hundred and fifteen and 50-100 dollars (\$4,615.50), that being the exact market value, at wholesale rates of the said property, at the time of its said destruction.

(2) Damage for loss of time, in endeavor to repair injury, and petitioner's time lost, one thousand dollars, (\$1,000).

manner of operating the smelter. *Sterrett v. Northport Min. & Smelting Co.*, 30 Wash. 164 (1902).

One who owns and operates ovens for the manufacture of coke from coal which was not mined in the land on which the ovens stand, is bound to pay damages to the owners of such land for injuries to vegetation by gases given off in the process. *Robb v. Carnegie Bros. & Co.*, 145 Pa. 324, 14 L. R. A. 329 (1891).

A private nuisance may be created by casting gases from coke ovens upon the property of another, thereby injuring vegetation and trees growing thereon. *McClung v. North Bend Coal & Coke Co.*, 9 Ohio Cir. Ct. 259 (1895).

In an action to recover damages for injuries to growing crops and vegetables alleged to have been caused by

soot and poisonous fumes from an oil refinery, the plaintiff is not bound to show negligence on the part of the defendant in the operation of its plant, since the action is only based upon the maintenance of a nuisance. *Vautier v. Atlantic Refining Co.*, 231 Pa. 8 (1911).

The operation of a plant for the burning of brick on leased land in such a way that poisonous and noxious gases are generated and wafted upon the adjacent land of the lessor, thereby injuring and destroying a growing crop of wheat, constitutes a nuisance which entitles the lessor to maintain an action to recover damages caused thereby; and he is not estopped from claiming damages for such injury, because he leased the property for the operation of the brick plant, since he had the right to pre-

(3) For injury to petitioner's business reputation and business, caused by inability to comply with contracts and furnish regular customers, of whom he had many with orders, and for other direct and indirect injury to business, resulting therefrom, ten thousand dollars, (\$10,000).

Petitioner avers that all of the loss and damage to his property, and himself, as above mentioned and enumerated, was directly caused by the said defendant company, its agents, and employees and due to the existence, and operation of its said plant, and their negligence, and lack of care and skill, as above stated, and petitioner is entitled to recover from the said New Orleans Acid & Fertilizer Company, the full sum of fifteen thousand, six hundred and fifteen and 50-100 dollars, (\$15,615.50) as above enumerated, being actual loss and damage suffered from the acts and negligence of said defendant company.

Petitioner avers amicable demand without avail.

Wherefore, petitioner prays: That the said New Orleans Acid & Fertilizer Company, through its proper officers, or agent, be duly cited to appear and answer the demands of this petition, and that after due proceedings had, there be judgment in favor of petitioner, Benedict M. Wichers, and against defendant, New Orleans Acid & Fertilizer Company, in the full sum of fifteen thousand, six hundred and fifteen, and 50-100 dollars, (\$15,615.50) with interest from demand.

sume that the process adopted would be a reasonable one. *Fogarty v. Junction City Pressed Brick Co.*, 50 Kan. 478, 18 L. R. A. 756 (1893).

In the following cases the court also recognized the right to recover damages for injury to or destruction of vegetation by fumes and gases:

In *Jones v. F. S. Royster Guano Co.*, 6 Ga. App. 506 (1909), for injuries to vegetation, crops, and trees by gases from a fertilizer factory.—In *Bigbee Fertilizer Co. v. Scott*, — Ala. App. —, 56 So. 834 (1911), for injuries to garden products and other crops by fluorine gas permitted to escape from a fertilizer factory.—In *Powell v. Brookfield Pressed Brick & T. Mfg. Co.*, 104 Mo. App. 713 (1903), for destruction of a crop of corn by poisonous fumes permitted to escape from

furnaces used in burning brick.—In *Salvin v. North Brancepeth Coal Co.*, 44 L. J. Ch. 149, 31 Law T. (N. S.) 154, L. R. 8 Ch. 705 (1874), for injuries to vegetation and trees upon a plantation by gases escaping from coke ovens.—In *Broadbent v. Imperial Glass Co.*, 7 Deg. M. & G. 436, 5 W. R. 272, 26 L. J. Ch. 276 (1856), for injury to a garden by sulphuric acid and ammonia gases given off by a glass plant.—In *Saville v. Kilmer*, 26 Law Times (N. S.) 277 (1872), for the destruction of vegetation by poisonous vapors from a glass works.—In *Horres v. Berkeley Chemical Co.*, 57 S. C. 189, 52 L. R. A. 36 (1899), for the destruction of growing crops and plants by sulphuric acid gas which escaped from a chemical factory.—In *Ducktown Sulphur, C. & I. Co. v.*

Petitioner further prays that all of his rights be reserved to sue for any other damage or injury sustained through the acts, or negligence of said defendant not hereinabove specially enumerated.

Petitioner further prays for full reservation of all his rights to bring separate suits to abate the said nuisance, and enjoin and restrain its continuance.

Petitioner further prays for all costs and all orders in the premises, and for general relief.

PLEA.

General denial.

SOMERVILLE, J. Plaintiff and defendant reside in the town of Gretna, in this State, where they are engaged in pursuing two different, but very useful and worthy, lines of business. The former is a florist, and the latter, as its name indicates, is a manufacturer of fertilizer.

Plaintiff alleges that his property and business have been very largely damaged, through the fault of defendant, by the emission of fumes, gases, acids, etc., from its factory, which have destroyed the plants in his nursery.

Defendant answers by filing a general denial.

There was judgment in favor of plaintiff for \$1,000, and defendant has appealed. Plaintiff has answered the appeal, and asks for an increase in the amount of the judgment.

Barnes, (Tenn.), 60 S. W. 593 (1900), and United States Smelting Co. v. Sissan, 191 Fed. 293 (1911), for the destruction of growing crops by noxious gases given off by smelting works.—In Johnson v. Northport Smelting & Refining Co., 50 Wash. 567 (1908), for injuries to trees growing upon a farm by poisonous vapors arising from a smelter.—In Bliss v. Anaconda Copper & Min. Co., 167 Fed. 342 (1909), for injuries to crops and vegetation by arsenic and other destructive fumes from a copper smelter.—In Kansas Zinc Min. & Smelting Co. v. Brown, 8 Kan. App. 802 (1899), for injury to a vineyard, shrubbery and other vegetation caused by poisonous gases which escaped from a smelting plant.—In American Smelting & Ref. Co. v. Godfrey, 158 Fed. 225 (1907),

for injury to fruit, ornamental trees, vegetables and grass by gases containing sulphur dioxide and other destructive gases.

II. Injunction.

An injunction was granted in Appeal of Pennsylvania Lead Co., 96 Pa. 116, 42 Am. Rep. 534 (1880), restraining the operation of a plant used for the smelting of lead and other minerals, located within seventy-five feet of a farm on which the vegetation was practically destroyed by poisonous gases, fumes and vapors which escaped thereon. The court quoted the following extract from Blackstone: "If one erects a smelting plant for lead so near the land of another that the vapor and smoke killed his corn and grass and damaged his cattle thereon, this is held to be a nuisance."

The case presents only a question of fact, concerning which much testimony was heard on both sides. We have read the 460 pages of the record with much care, and are of the opinion that plaintiff has made out his case. He has sustained the burden of proof, and shown by a preponderance of evidence that he has suffered damage through the fault of defendant. His large collection of ferns, said by some witnesses to have been the largest and best in the South, was practically destroyed during the first week of October, 1908, by fumes, gases, and acids emitted from the plant of defendant, at the time that it was firing up at the beginning of the fall season.

Some of defendant's witnesses testify that defendant's plant is the most perfect fertilizer manufactory in the country, and that it emits no odors, and that the waste of acids is in such small quantities as to be harmless to human and plant life. Other witnesses for defendant admit that the fumes are quite dark and heavy at times, the presence of sulphuric acid gas quite manifest, and that its effect is harmful, and that it renders human beings uncomfortable. Many witnesses on both sides testify to the objectionable conditions attending the operation of the factory prior to the time of its improvement in 1904, when the Dens & Scrubber system was installed, for the purpose of conveying the sulphurous gases into the Mississippi river, below the surface of the water. There were also installed the Gay-Lussac and Glover towers, for the purpose of conserving and recovering the acids formed during the progress of the work. All of these additions were real improvements, and they did very much to lessen the damage wrought by the defendant's plant, where materials so obnoxious and harmful as sulphur, acid, phosphate, cotton seed meal, blood, nitrate, soda, potash, sulphate of potash, etc., were used. During the operation of the plant different gases were formed, such as

While admitting that the owner of a farm is entitled to damages for injury to her crops and fruit trees by fumes generated by a fertilizer factory and blown across plaintiffs' farm, yet the court in *Sellers v. Parvis & Williams Co.*, 30 Fed. 164 (1886), denied the right of the plaintiff to enjoin the operation of defendant's factory, on the ground that the injury, whatever its extent, had already been suffered and damages therefor could easily be ascertained by a jury.

A bill was dismissed in *Ladd v.*

Granite State Brick Co., 68 N. H. 185 (1894), for an injunction restraining the operation of a plant for the manufacture of bricks, on account of an injury caused to the foliage on certain white pine trees located near the kilns caused by the smoke or gases from the kilns; the trees were not killed and the value of the grove as a protection to plaintiff's dwelling from wind and storms was not affected nor was its ornamental value seriously impaired.

carbonic acid gas, salicic acid, hydrofluoric, chlorine, nitrogen, etc. Some, if not all, of these gases, are harmful to plant life, if emitted in sufficiently large quantities; but defendant's witnesses say that the component parts are all measured, and that those parts which escape are infinitesimal and harmless, and are soon dissipated by the air.

The weight of the evidence shows that the position of defendant on this point is more theoretical than practical. Defendant's superintendent testifies that no test is made of the escape of chlorine gas.

Dr. Schwartz, who was called as a witness by both plaintiff and defendant, says: "I believe sulphurous acid gas in large quantities is injurious to plant life. * * * Yes; I have observed larger quantities than usual escape from that plant. (He fixes one occasion about October, 1908.) * * * I saw ferns damaged, and I saw palms that were damaged. * * * No method has been found absolute to prevent the escape entirely, so it cannot be detected at the stack, and since a normal amount always does escape we can only estimate the amount of damage when that normal amount escapes. * * * It was the sulphurous fumes that did the damage. * * * Yes sir; the sulphurous fumes."

The superintendent of defendant corroborates some of the testimony for plaintiff. He says that he noticed "some little vegetation was scorched" in September or October, 1908. That: "There may be a little excess of the amount of gases escaping, and when we notice that we regulate it right away. * * * The escape is a little heavier (when beginning to operate in the fall) than at other times, to get the plant under control, and it is not excessive at that time. * * * I say it is difficult to control in starting up."

The evidence shows that some of these gases are carried long distances in the air.

Defendant claims too much in saying that its modern machinery is perfect. The evidence is conclusive that it is not. Like many other excellent machines, its imperfections are more manifest at the time of starting or firing up, at the beginning of the season in September, after having been closed down for several weeks, which closing is customary with defendant once every year. And it was at this time that plaintiff suffered his greatest damage. The superintendent of defendant company also testified that it had very recently settled several small claims for damages against defendant, because of its destructive fumes, acids, gases, etc.

Plaintiff has proved his case.

The judgment appealed from is affirmed.

LYNN v. OMAHA PACKING CO.

[SUPREME COURT OF NEBRASKA, MARCH 16, 1911.]

88 Neb. 720.

1. Master and Servant—Injury—Assumption of Risk.

Where a master has expressly promised to repair a defect, the servant does not assume the risk of an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance.

2. Master and Servant—Unsafe Place—Risk—Injury—Contributory Negligence.

A servant who has been induced by a master's promise to continue to work in an unsafe place may do so without being guilty of contributory negligence and without assuming the risk of injury, so long as he may reasonably expect the master's promise to be kept, unless the danger is so obviously imminent and immediate that no reasonably prudent person would continue to work in that place.

[Headnotes by the Court.]

Appeal by defendant from a judgment of the District Court of Douglas County, rendered in favor of plaintiff, John Lynn, in an action brought by him to recover for personal injuries sustained while in defendant's employ. Affirmed.

For appellant—Greene, Breckenridge & Matters.

For appellee—Smyth, Smith & Shall.

PETITION.

The plaintiff complains of the defendants, and each of them, and alleges:

1. That the defendant, the Omaha Packing Company, is a corporation, and at all times mentioned herein has been engaged in operating a packing house in the city of South Omaha, and at the time of the injuries sustained by the plaintiff herein, the defendant, Fred Moore, was a foreman in the employ of said Omaha Packing Company.

NOTE.

On the subject of Assumption of Risk, see notes in 5 Am. Neg. Rep. 22, 120; 7 Am. Neg. Rep. 72, 97, 588; 8 Am. Neg. Rep. 71, 90, 183, 638; 9 Am. Neg. Rep. 196, 280, 306, 467; 10 Am. Neg. Rep. 212.

And on the subject of the Duty of a Master to Furnish a Safe Place to Work, see note in 12 Am. Neg. Rep. 251.

And on the subject of Injury to a Servant Sustained After the Making of a Promise to Repair, see note in 16 Am. Neg. Rep. 503.

2. That on and prior to the 21st day of March, 1908, this plaintiff was in the employ of the Omaha Packing Company in its hog killing department. Plaintiff shows that in the work of said hog killing department and in the operation thereof large numbers of men are employed, each one being assigned to his specific work; that after the hogs have been killed in said department, the carcasses of the same are passed through scalding water, and then through knives or scrapers operated by machinery, for the purpose of removing the hair therefrom. They are then placed upon a bench, where the heads are removed from the body, save and except small portions of skin or fleshy portion on the back part of the neck, the bones of the neck being entirely severed; that in the due operation of said department and ordinarily, the head is entirely removed, except as above stated, and the bones are entirely severed; that the carcass of said hog is then suspended by its hind feet from a pulley or roller attached to a rail or track, down which and along which it passes and is carried by its own weight; that it gradually moves from the point where it is placed upon said rail or track to the storeroom or chill room, and during its progress the work of cleaning, scraping, washing, and further removing the head from said hog is performed as it moves along said track or rail; that a large number of employees are engaged in said work, each one having a definite and specific part of said work to perform.

3. That on said 31st day of March, 1908, this plaintiff was engaged in said department as an employee of the Omaha Packing Company under the immediate control, supervision and direction of the defendant, Fred Moore; that this plaintiff was employed and was assigned to the duty of scraping said hog by knives held in his hands as it passed down and along said rail or track; that said hogs were killed, suspended from said rail on said pulleys, and passed down the same at the rate of about 400 to 450 per hour, and this plaintiff was required to scrape all of said hogs as they passed in front of him during that time; that this plaintiff and the other employees in the performance of their work were required to work with great speed; that the heads of said hogs and each of them, in the due and proper conduct of said business in the work of said department, were removed entirely before the carcass reached this plaintiff and before he was required to perform his work thereon.

4. That on said 31st day of March, 1908, the employee whose duty it was to remove the heads of each of said hogs and to entirely sever the bones in the neck thereof, was absent from said work; that the defendants placed and caused to be placed another employee, whose

name is to this plaintiff unknown, in place of said regular employee; that the person so ordered by said company to remove said heads was inexperienced in said work, incompetent to perform said work, and unable to perform the same; that on said 31st day of March, 1908, this plaintiff, while performing his work of scraping said hogs, was suddenly called upon, ordered and required by the defendant, Fred Moore, the foreman in said department and there in charge of the business of said Omaha Packing Company, to remove the head from certain of said hogs as they passed down and along said track or rail hereinbefore described, and which heads had, by reason of the incompetency and lack of skill of the employee whose duty it was to remove the same, been allowed and permitted to remain upon said hog; that it was no part of the duties of this plaintiff to remove the heads from said hogs, and the removal of the same was wholly the work of other employees in said department; that when ordered by the defendant Fred Moore to remove said heads from said hogs this plaintiff, in obedience to said command, endeavored so to do; that in order to remove the same he was required to stoop over nearly to the floor and remove the same while said hog was passing down and along said track or rail; that said floor was wet and slippery and while attempting to stoop over and remove the head from said hog, in obedience to said command, this plaintiff, without any fault or neglect on his part, slipped and fell, the knife which he then held in his right hand and with which he was undertaking to remove the head from said hog, coming in contact with, and severely cutting and lacerating the plaintiff's left arm above the wrist and below the elbow; that he then and there, and by reason thereof, sustained great and serious and permanent injuries in this, that the tendons of said left arm were severely cut and lacerated so that the same would not and have not healed, and said left arm has been greatly, seriously and permanently injured; that said injuries were sustained wholly by reason of the negligence of the defendants herein, in this, that the said defendants employed an incompetent person to remove the heads of said hogs, and the defendants knew that said person was incompetent and unfit to perform said work; that the removal of the heads from said hogs was no part of this plaintiff's work, and to remove the same or attempt to remove the same while said hog was suspended from said rail and moving along the same was dangerous and likely to result in injury to any person removing the same, all of which was known to the defendants herein; that this plaintiff was ordered to remove the same, was ordered to do work not proper for him to perform, and this plaintiff was suddenly commanded and required to perform such

dangerous work, and to perform the same without having time to consider the conditions, consequences or dangers attending such work; that said injuries were further caused by the negligence of the defendants, in that the place provided by the defendant within which this plaintiff could work was inadequate and too small; that this plaintiff was allowed only about ten feet of space within which to work, and which space was insufficient and inadequate; that this plaintiff complained to defendant Fred Moore, foreman as aforesaid, of such insufficient space and complained that he could not perform his work with reasonable safety in such space, and he was ordered by said defendants, through said Moore, to continue his work, and was promised by him that said space would be enlarged and increased and that he did continue his work relying upon said promise and agreement that the space within which he had to work would be enlarged and increased, and that if said space had been enlarged and increased, the dangers would have been in part removed.

5. Plaintiff alleges that prior to said accident he was in good health and had an earning capacity of about \$3.50 per day; that by reason of said accident his left arm has been seriously and permanently injured, and from the time of said accident down to the time of the filing of this petition he has been unable to perform any work with said arm, and has been wholly unable to perform his usual and customary labor; that he was compelled to employ physicians and surgeons and secure medicines, and has incurred expense for doctors and medicines in the sum of \$100; that by reason of the wrongs of the defendants herein, as hereinbefore set forth, his earning capacity has been damaged and destroyed, that he suffered great pain and in all has been damaged in the sum of \$2,000, no part of which has been paid.

Wherefore, plaintiff prays judgment against the defendants and each of them for \$2,000 and costs.

ANSWER.

Comes now the defendant, Omaha Packing Company, and for its answer to the plaintiff's petition herein, shown to this court.

I. This defendant denies each and every allegation of plaintiff's petition not herein specifically admitted.

II. This defendant admits that it is a corporation operating a packing house in the city of South Omaha, Nebraska, and that, at the time of the injuries sustained by the plaintiff herein, the defendant, Fred Moore, was a foreman in the employ of said Omaha Packing Company.

III. This defendant further admits that on or about the 21st day of March, 1908, said plaintiff, John Lynn, was in the employ of said defendant in its hog-killing department.

IV. Defendant avers that all of the risks of the employment of which said John Lynn was engaged at the time of his injury, were the usual and ordinary risks of the business, were obvious, open, known to and fully understood by said plaintiff, and were assumed by him as one of the conditions of his employment with this defendant.

V. Defendant further answering avers that the said John Lynn was himself careless and negligent at the time of his injury, and did not take ordinary care to observe the conditions under which he was at work, and that his failure in these respects was carelessness and negligence on his part, which was the proximate cause of his injury; that if the negligence of any other person or persons contributed to his injury, it was not the negligence of this defendant, but the negligence of fellow servants of the said John Lynn.

Wherefore, this defendant prays to be hence dismissed with its costs.

LETTON, J. In March, 1908, the plaintiff was in the employ of defendant in the hog-killing department of its packing house in South Omaha. In this department large numbers of men are employed. The evidence shows that, after the hogs are killed, the carcasses are taken from the vat in which they are scalded, and suspended by the hind legs from a hook fastened to a grooved wheel which rolls upon an overhead track. During its progress along this track while thus suspended the carcass is cleaned, scraped, washed, and the entrails and head removed by different workmen, each of whom occupies a certain station, and performs a certain assigned duty. The work is required to be rapidly performed, it being customary to kill and clean from 400 to 500 hogs per hour. One of the first operations after the hogs are scalded is to pass them through a scraping machine, where most of the hair is removed. From this machine the hog is rolled on a bench, where a man breaks or disjoints the neck bone, and cuts the flesh and skin of the neck so that ordinarily thereafter the head is only attached by a small portion of flesh and skin. After a number of intermediate operations, the carcass in its progress reaches the tonguer, who stands in a pit about 3½ feet below the floor. This man cuts the head off and removes the tongue. The next men in line are the back shaver and the belly shaver, and the next man beyond them is the man who removes the

kidney fat from the inside of the hog. This is dropped into a large pan placed on the floor, about 4 feet wide by 8 or 9 feet long, and 8 or 9 inches high. As the carcass travels along the rail, it passes over the center of this pan. Beyond this workman are the government inspectors, who stamp the carcass, and from them it passes directly into the cooling room. The plaintiff, Lynn, at the time of the accident, occupied the position of the belly shaver. After the hogs passed the tonguer, Lynn's duty was to scrape the remaining hair from the belly, and, if the tonguer had been unable to remove all the heads, to cut off the heads before the carcass reached the kidney fat cleaner. Ordinarily there was about 35 feet between the pit where the tonguer stood and the fat pan, and Lynn had all of this space in which to cut off the head while the hog was moving along the track. On the day of the accident the man who had been regularly employed as "header" and whose duty it was to dislocate the necks and nearly behead the animals, was not working, and an inexperienced or inexperienced man took his place. The result was that the number of heads which the tonguer was unable to remove as the hogs passed him was much increased, and it became necessary for Lynn to remove from 10 to 15 heads in the same space of time in which ordinarily he would be compelled to remove only one or two. The day before the accident the lard pan, under the direction of the foreman, had been removed in such a manner as to allow Lynn only about 10 feet in which to work, instead of 35, and shortening the time within which to remove the heads. On that day he told the foreman that it was impossible to do the work in that space. The foreman replied: "Yes; you can do it if you want to. There is space enough there." On that day few carcasses came down with the heads on.

Plaintiff testifies that on Saturday, the day of the accident, in the forenoon, there would be about one in eight or ten carcasses on which the head remained, but in the afternoon after the "header" was changed there were many more. He testifies as follows: "Q. Now, did you say anything to the foreman or did the foreman say anything to you about the removal of those heads? A. Well, I was letting them go past, and he says 'Get them off.' Q. He says what? A. I was shaving, letting them go past mostly, because of the small space. He says, 'Get them heads off, what you can of them.' Q. Was that in the forenoon or afternoon? A. This was in the afternoon, about 3:30 I should say. Q. What did you say to him then when he told you that? A. I told him I hadn't enough space to shave. Q. And what did he say then? A. 'Well,' he says, 'go ahead and do the

best you can. I will fix that.' Q. Well, was the space in which you had to work increased or made larger that afternoon? A. No. Q. After he said that, did you continue to take off the heads of those that came down, or try to take them off? A. Yes, sir. Q. Did you receive any injury there that afternoon? A. Yes; I cut this left arm getting a head off. Q. Now, describe to the jury what you were doing at the time you received your injury? A. Well, I was shaving those bellies and cutting those heads off, all I could cut. The necks were not broken, and it was a very hard job to get a knife in between and cut a head off there because you had to stoop so low, and the pan was here. You couldn't step in the pan, that would be the limit, and I reached over this pan to cut the head off, that way [indicating], holding the head by the ear, this way, in this hand, and was cutting it, and my foot slipped and this knife came around with a swing and chopped those tendons off, cut them right across. Q. Now, at the time you received your injury, did you have hold of anything with your left hand? A. Had hold of the ear of the hog. Q. Had hold of the ear of the hog. What did you have in your right hand? A. The knife. Q. Now, where were you standing at the time with reference to this pan in which the lard was put? A. Well, reaching over the pan, holding the hog's head this way [indicating] to cut the head off. * * * Q. Tell the jury whether or not as you had hold of the ear of the hog at that time you were able to walk any farther south or follow the carcass any farther? A. I couldn't do it. I couldn't go any further. I had got to the limit. Q. Why couldn't you go any farther? A. I would step into the lard pan.'

The witness also testified that, relying on the strength of the foreman's promise to attend to the arranging of the space, he continued in the work, although he knew it was dangerous on account of the lard pan being in the way. He also testifies that no definite promise was made as to the time when the working space would be restored, but that Moore said it would be done at the first opportunity; that this would be when the rail was stopped—that it might be in five minutes or in an hour, or not until Monday. This testimony as to the manner of the operation, the complaint made by Lynn, and the promise by Moore is corroborated by other witnesses, and is not disputed; the defense introducing no testimony.

Defendant contends that the court should have instructed the jury to return a verdict in its favor. This contention is based upon the propositions that a servant engaged in a hazardous occupation assumes the risk of the injury to himself from all of its obvious dangers, and that the bloody, slippery, greasy floor, which was a neces-

sary condition of the occupation, caused plaintiff's foot to slip, and that this was the proximate cause of the injury. If the evidence showed that the slippery condition of the floor alone and without the intervention of any other factor or element caused the plaintiff's foot to slip, and that this alone was the proximate cause of the injury, there might be ground for this contention, but the evidence convinces us that while the slippery floor, no doubt, was one of the causes for the accident, it did not result from this condition alone. It was plainly expected of Lynn, and it was his duty, to make an effort to remove all of the heads that he could. Carcasses were moving in front of him at the rate of seven or eight a minute, many of them with heads attached. He had only a space of about 10 feet in which to work. His movements were necessarily made rapidly. He had no time to weigh and consider the chances he might take by reaching a greater or less distance over the lard pan to detach the head. He believed the condition was temporary, and was justified in relying upon the promise that the former space would be restored. The conditions were unusual for the reason that on account of the incompetent and inexperienced "header" unheaded carcasses were coming in unusual and excessive numbers. We think the evidence required the submission of the question of defendant's negligence, and that the instruction was properly refused.

Complaint is made that the court erred in the statement of the issues and in its instructions concerning the issues. We believe it unnecessary to set forth the instructions verbatim. In substance, in addition to the usual instructions as to the burden of proof, preponderance of evidence, etc., the jury were told that, in order to recover, it was incumbent on the plaintiff to prove that the defendant was negligent in not providing him with a safe place to work; that he received the injuries complained of by reason of defendant's negligence in failing to remove the lard pan; and that this failure was the direct and proximate cause of the injury. They were also instructed that if they found that the space provided for the plaintiff in which to perform his work was not reasonably sufficient to enable him to perform his work with reasonable safety, and that after he ascertained this fact he complained to the foreman who promised that the space should be enlarged, and if they found that plaintiff continued to work in reliance upon this promise, then he was entitled to recover for any injury occurring by reason of the insufficient space or room in which to perform the work, unless they found that the danger was so open and obvious that an ordinary, careful and prudent person would have refused to have performed the same.

They were further instructed that even if the promise had been made this alone would not make the defendant liable; that the evidence discloses that the plaintiff was working in a slippery, greasy place, and among the risks which were inherent in his service was the risk that his feet might slip and slide in the grease and filth in the floor, and, if they believed from the evidence that while in the act of beheading a hog the plaintiff slipped and lost his balance, and the slippery floor was the proximate cause of the injury, then the plaintiff was not entitled to recover, for the reason that he assumed the risk of the slippery floor. These instructions with the others given seem to present the issues fairly.

It is complained that the fifth instruction "does not submit the negligent insufficiency of the space as a matter of fact, but it assumes that the space" was too small, and that the defendant was negligent. But the second instruction told the jury that it was incumbent on the plaintiff to prove that the defendant was negligent in not providing plaintiff with a safe place to work, and the fifth instruction in this respect is as follows: "You are instructed that if you believe from a preponderance of the evidence that on the day of the accident the space or room provided for the plaintiff in which to perform his work was not reasonably sufficient to enable him to perform his work with reasonable safety," etc. It will be seen that defendant's negligence was not assumed by the court, but whether negligence existed or not was left to be determined by the jury. The remainder of this instruction lays down the principle announced in *Sapp v. Christie Bros.*, 79 Neb. 701, 113 N. W. 189; *Id.*, 79 Neb. 705, 115 N. W. 319. The syllabus to the latter opinion is: "A servant, who has been induced by a master's promise of repair to begin or continue to work with defective appliances, may use such defective appliances without being guilty of contributory negligence and without assuming the risk of injury from such defects, so long as he may reasonably expect the master's promise of repair to be kept, unless the danger from using such defective appliances is so obviously imminent and immediate that no reasonably prudent person would begin or continue to work with them." Defendant contends that this principle is not applicable because in *Sapp v. Christie Bros.*, *supra*, *Lee v. Smart*, 45 Neb. 318, 63 N. W. 940, and *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 16 Am. Neg. Cas. 530, 20 N. W. 860, 49 Am. Rep. 724, the defect was not a matter in dispute; and, further because the time in which Lynn expected the change to be made had not commenced to run. As to the first point we are of opinion that the evidence clearly shows the curtailed space was insufficient and

the foreman virtually acknowledged this to be the fact by his promise to change. When we consider the work that was expected of plaintiff, his facilities for performing it, and the time and space allotted, we think the jury were justified in finding the place defective.

As to the second point, Lynn expected the change to be made as soon as convenient, and we think it clear that the time during which he continued in the employment after the promise was within a reasonable time for the promise to be made good. As he says, he did not expect the work of the gang to be stopped for him, but he did expect that the change would be made at the first convenient opportunity. It is unnecessary to consider the reasons for this principle. They may be found set forth in the extensive note to *Illinois Steel Co. v. Mann*, 170 Ill. 200, 48 N. E. 417, 40 L. R. A. 781; *Rice v. Eureka Paper Co.*, 174 N. Y. 385, 14 Am. Neg. Rep. 149, 66 N. E. 979, 62 L. R. A. 611, 95 Am. St. Rep. 585; *Swift v. O'Neill*, 187 Ill. 337, 58 N. E. 416, as well as in the opinions of this court above referred to. We think that this case is within the rule.

The judgment of the district court is affirmed.

GREGORIC V. PERCY-LASALLE MINING & POWER CO.

[SUPREME COURT OF COLORADO, APRIL 1, 1912.]

— Colo. —, 122 Pac. 785.

1. Master and Servant—Safe Place to Work—Safe Place to Drink Water—Safe Place to Relieve Necessities.

A master's duty to use ordinary care to provide his employees with a reasonably safe place to work extends to ways for passing to and from work, or to secure drinking water, or to a place provided to relieve physical necessities.

2. Master and Servant—Negligence—Open Chute.

An employer who leaves unprotected an ore chute between the rails of a track running through an unlighted stope used for ingress and egress in a mine, cannot be said to be free from negligence as matter of law.

3. Master and Servant—Assumed Risk—Open Chute.

An employee does not assume the risk of danger from an open and unlighted chute in a passage of the mine with which he is unfamiliar.

4. Master and Servant—Contributory Negligence—Question for Jury.

In an action for death resulting from personal injuries, the question of contributory negligence is for the jury, where from the facts established fair-minded men might honestly draw different conclusions.

5. Appeal—Bill of Exceptions—Sufficiency.

A bill of exceptions sufficiently shows that it contains all of the evidence in the case and that it was certified and allowed by the judge, where the bill was O. K'd. by counsel for respondent and the trial judge certified that it was tendered to him with the request that it be signed and sealed and made a part of the record, "all of which is accordingly done," thereby adopting as correct the certificate of the stenographer that the bill of exceptions contained all the evidence.

6. Master and Servant—Safe Place—Question for Jury.

The question whether the master's failure to provide a safe place was the proximate cause of the death of an employee who fell into an open chute in an unlighted and unfamiliar passage of the mine is one for the jury.

Appeal by plaintiff from a judgment of the District Court of Pueblo County, rendered in favor of defendant in an action brought to recover damages for the alleged negligent death of plaintiff's husband. Reversed.

NOTE.

On the subject of the Duty of a Master to Furnish a Safe Place to Work, see note in 12 Am. Neg. Rep. 251.

And on the subject of Assumption

of Risk, see notes in 5 Am. Neg. Rep. 22, 120; 7 Am. Neg. Rep. 72, 97, 588; 8 Am. Neg. Rep. 71, 90, 183, 638; 9 Am. Neg. Rep. 196, 280, 306, 467; 10 Am. Neg. Rep. 212.

And on the subjects generally, see

For appellant—M. J. Galligan.

For appellee—William E. Hutton (Bruce B. McCay, of counsel).

GABBERT, J. Plaintiff in error brought suit to recover damages sustained on account of the death of her husband claimed to have been caused by the negligence of the defendant. At the conclusion of the evidence on the part of plaintiff, the court directed a verdict in favor of defendant. The motion for such verdict was sustained by the court for the reasons that the deceased had voluntarily gone into a place of danger, had assumed the risk of the injury which resulted in his death, and was guilty of contributory negligence. Plaintiff brings the case here for review.

The evidence, in substance, was that deceased was employed by the defendant company in the eleventh level of the mine it was operating at a point designated as "No. 3 Raise." In order to reach this point, it was necessary to pass through a stope. This stope was unusually wide, and semicircular in shape. It was built or filled up with square sets placed on top of and against each other. Over these sets, planks had been laid practically along the center of the stope its entire length. The planking was of considerable width, but did not entirely cover the sets. There was also a track through this stope from the raise where deceased was employed to what is designated the "Percy incline." For most of the distance the planking was on both sides of the track. Between the rails of the track was an open ore chute some 25 or 30 feet in depth. The remainder of the space between the rails was planked. The chute was unprotected, nor was any light or other signal displayed, to warn employees of its existence. It had been in this condition for about three months. The stope was dark, being only lighted by candles carried by employees. The day deceased was injured, which resulted in his death, was the first time he had ever been employed in the raise or had passed through the stope in question. The track at one place made a sharp turn. In going to his work deceased went in with other employees entering the stope from the Percy incline. One of these employees was in advance. The

Vols. 13-16 Am. Neg. Cas., where the "Master and Servant Cases," from the earliest period to 1896, decided in the States and Territories and the Federal and Supreme Courts of the United States, are reported and classified and arranged in alphabetical order of

States. And for subsequent "Master and Servant Cases" to date, see Vols. 1-21 Am. Neg. Rep., and this volume (1 N. C. C. A.) and succeeding volumes of Negligence and Compensation Cases Annotated.

chute was between the turn in the track and the raise. In going in, the employees with deceased followed the track to near the point where the turn referred to exists, and then left it, walking on the boards which had been laid over the square sets to a point on the track beyond the ore chute which they followed to the raise. It does not appear that deceased knew of the existence of the chute or that he had been told that it was within the track. About three hours later he left the place where he was at work, carrying a lighted candle, and following the track, stepped into the chute, and received injuries which resulted in his death. A candle lights but a comparatively small space. The purpose for which he left his place of work and followed down the track is not definitely disclosed. It appears that drinking water was kept at a place in the mine which employees could attain by following the track. This place was beyond the ore chute. It also appears that in order to reach the toilet room the same course had to be taken.

An employer is required to use ordinary care in providing a reasonably safe place for his employees to work in. *Carleton M. & M. Co. v. Ryan*, 29 Colo. 401, 68 Pac. 279; *Burnside v. Peterson*, 43 Colo. 382, 96 Pac. 256, 17 L. R. A. (N. S.) 76; *Roche v. D. & R. G. R. Co.*, 19 Colo. App. 204, 15 Am. Neg. Rep. 29, 73 Pac. 880. This rule extends to ways of ingress and egress through which the employee must pass in going to and from his work, or to where water is provided for drinking purposes, or to a place provided for an employee to relieve his physical necessities. 2 *Dresser's Employers' Liability*, § 103; *Va. Bridge & Iron Co. v. Jordan*, 143 Ala. 603, 42 So. 73, 5 Ann. Cas. 709. See, also, authorities cited in note, 712, *White on Personal Injuries*, § 44; *Strobel v. Gerst Bros. Mfg. Co.*, 148 Mo. App. 22, 127 S. W. 421; *White on Mines & Mining Rem.* § 395.

Applying this rule, it is apparent that the court, on the testimony to which we have referred, erred in directing a verdict in favor of the defendant, for the reason that it was at least sufficient for the jury to consider under appropriate instructions whether negligence of the defendant was the proximate cause of the injury suffered by the deceased. The stope was the means of ingress and egress which the defendant provided for the use of its employees in going to and from their work, and also for the other purposes to which we have referred.

The ore chute was not guarded, neither was any signal displayed which would warn an employee of its existence. It does not appear that deceased knew of its existence. He had never been in the stope before. He was carrying a lighted candle at the time of his injury,

which was the usual means for light provided for the use of employees when going through passages in the mine. He had not passed over this identical place in the track when going to his work a few hours previous. He only assumed the risks from dangers which he knew existed or which, by the exercise of reasonable care, he could have ascertained. Risks resulting from the negligence of an employer are not assumed by his employee unless he is aware of the danger caused by such negligence, or by the exercise of reasonable care should have had knowledge of such danger. To have voluntarily gone to a place of danger, deceased must necessarily have known of it, or by the exercise of legal care discovered it, or its existence must have been obvious.

Contributory negligence which precludes a recovery for an injury must be such as co-operates in causing it, and without which it would not have happened. *Jackson v. Crilly*, 16 Colo. 103, 9 Am. Neg. Cas. 132n, 26 Pac. 331.

From the facts established by the testimony on the part of plaintiff, the most that can be claimed is that the question of whether the deceased was guilty of contributory negligence was one from which different fair-minded men might honestly draw different conclusions. Where, in an action for a personal injury, the question of contributory negligence of the person injured is dependent upon inferences to be drawn from acts and circumstances from which different intelligent men might honestly reach different conclusions, it is for the jury to determine, under appropriate instructions, whether or not contributory negligence has been established. *Denver & R. G. R. Co. v. Spencer*, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121.

On behalf of defendant it is contended that the bill of exceptions is not sufficient to permit a review of the directed verdict. In support of this contention, it is urged that the bill of exceptions does not purport to contain all of the evidence in the case, and that it does not appear therefrom that the bill of exceptions was certified and allowed by the judge. In support of these contentions, *Big Kanawha Co. v. Jones*, 45 Colo. 381, 102 Pac. 171, is cited. We do not think the case is applicable. Perhaps the certificate of the trial judge to the bill of exceptions is not a model. It appears from the bill that the official court stenographer certified that it contained a full, true, and complete transcript of all the testimony and evidence offered and received on the trial of the cause. The bill was O. K.'d by counsel for defendant. The certificate of the judge is to the effect that the bill of exceptions was tendered to him with the request that the same be signed and sealed and made a part of the record, "all of which is

accordingly done." We think by this certificate, the certificate of the stenographer, that the bill of exceptions contained all the evidence, was adopted as correct, and that it thereby appears, in connection with the O. K. of counsel for defendant, that it was settled and allowed by the trial judge as the bill of exceptions in the case.

Numerous propositions are argued by counsel for defendant in support of his contention that the judgment should be affirmed which we do not deem it necessary to consider in detail, as they all go to the one proposition of whether the testimony on the part of plaintiff was sufficient upon which to submit the case to the jury. The duty of an employer to furnish a safe place for his employees to work in extends to such parts of the premises as he has prepared for their occupancy while doing their work, and such other parts as he knows, or ought to know, that they are accustomed to use while doing it. *Labatt on Master & Servant*, § 626; *Harris v. United S. S. Co.*, 75 N. J. Law, 861, 70 Atl. 155; *Morris v. Burgess Sulphite Fibre Co.*, 70 N. H. 406, 47 Atl. 412, 85 Am. St. Rep. 634.

The sole question presented in the record before us is whether the testimony on the part of plaintiff established facts from which it could be inferred that the failure of defendant to comply with this rule of law was the proximate cause of the injury of deceased. We think it was sufficient to require the court, at the proper time, to submit this question to the jury under appropriate instructions.

The judgment of the district court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

MUSSER and HILL, JJ., concur.

**CUNNINGHAM (AS STATE AUDITOR) v. NORTH WESTERN
IMPROVEMENT CO.**

[SUPREME COURT OF MONTANA, NOVEMBER 21, 1911.]

— Mont. —, 119 Pac. 554.

1. Master and Servant—The Miners' Compensation Act—Police Power—Constitutionality.

The Miners' Compensation Act (Laws 1909, Chap. 67), providing for State industrial insurance and compensation for injuries sustained by employees engaged in mining coal within the State, is constitutional, as a valid exercise of the police power.

2. Master and Servant—Insurance Fund—Miners' Compensation Act—Statute—Class Legislation.

The Miners' Compensation Act (Laws 1909, Chap. 67), which creates a State insurance fund for the benefit of workmen disabled while engaged in mining coal within the State, is not unconstitutional as class legislation as singling out a particular hazardous occupation and subjecting it to burdens not placed on other employments equally hazardous, where the statute is equally applicable to workmen within the State engaged in the particular hazardous business of mining coal.

3. Master and Servant—Miners' Compensation Act—Trial by Jury.

Miners' Compensation Act (Laws 1909, Chap. 67), which provides a scheme for industrial insurance for the benefit of persons engaged in mining coal within the State and those dependent upon them, in case of injury or death in the course of their employment, is not unconstitutional as violating the section of the Constitution providing that the right of trial by jury shall remain inviolate.

4. Master and Servant—Miners' Compensation Act—Constitutionality—Tax—Benefit.

The Miners' Compensation Act (Laws 1909, Chap. 67), which provides a scheme of accident insurance and benefits for persons engaged in mining coal within the State, and which requires the funds to be provided by payment of one per cent. of the wages of such persons and a tax on the employers of one cent per ton for each ton of coal mined, is in the nature of an occupation or license tax, and therefore the plan provided for its collection is not invalid as taking property without due process of law.

5. Master and Servant—Miners' Compensation Act—Constitutionality—Police Power.

The Miners' Compensation Act (Laws 1909, Chap. 67), which provides for an

CASE NOTE.

**Constitutionality of Workmen's
Compensation Acts.**

The question as to the Constitutionality of the Workmen's Compensation Acts passed in the various States is

attracting wide attention at the present time. Within the past few months the highest courts of NEW YORK, WISCONSIN, MASSACHUSETTS, OHIO, MONTANA and WASHINGTON have had occasion to pass on the validity of such statutes. Cases which have considered

indemnity to be paid to employees injured in the course of their employment in the mining of coal within the State, is not invalid as a police regulation, on the ground that it provides for the payment to an injured employee of his compensation in a lump sum.

6. Master and Servant—Miners' Compensation Act—Constitutionality—Operation.

The Miners' Compensation Act which provides for indemnity to be paid to injured employees engaged in mining coal in the State, from a fund collected by assessment levied on both the employer and employee, is not unconstitutional on the ground that it fails to differentiate between a careful and careless employer.

7. Master and Servant—Miners' Compensation Act—Constitutionality—Judicial Power.

The Miners' Compensation Act (Laws 1909, Chap. 67), which provides indemnity for employees injured in mining coal within the State, from a fund to be collected from an assessment levied on both employer and employee based on the amount of coal mined and the amount of wages earned, and providing a summary method for the disposition of claims filed under the Act, is not unconstitutional, as conferring judicial power upon ministerial officers.

8. Master and Servant—Miners' Compensation Act—Constitutionality—Equal Protection of Law.

The Miners' Compensation Act (Laws 1909, Chap. 67), which provides a scheme of accident insurance and disability benefits for employees engaged in mining coal within the State, to be paid from a fund collected from mine operators in accordance with the amount of coal mined and from employees in accordance with the amount of wages earned, is unconstitutional in that it fails to protect the employer who furnishes compensation under the Act, from being sued for the injury in an action at law, and thus compelled to pay twice.

Appeal by defendant from a judgment of the District Court of Lewis and Clark County, rendered in favor of plaintiff upon the submission of a controversy on an agreed statement of facts, for the purpose of determining the constitutionality of the Miners' Compensation Act. Reversed.

For appellant—William Wallace, Jr., John G. Brown, and R. F. Gaines.

For respondent—Albert J. Galen, Atty. Gen., and J. A. Poore, Asst. Atty. Gen.

SMITH, J. The Eleventh Legislative Assembly passed "an Act

such legislation are State ex rel. *Yaple v. Creamer* (Ohio), reported on page 30 of this volume (1 N. C. C. A.) ante; *Ives v. South Buffalo R. Co.* (N. Y.), reported on page 517 of this volume (1 N. C. C. A.) ante; Re opinion of the Justices (Mass.), reported on page 557 of this volume (1 N. C. C.

A.) ante; CUNNINGHAM v. NORTHWESTERN IMPROVEMENT CO. (Mont.), the case annotated; and *Borgnis v. Falk Co.* (147 Wis. 327) and State ex rel. *Davis-Smith v. Clausen* (Wash., 117 Pac. 1101), reported in 3 N. C. C. A. *Negligence and Compensation Cases Annotated* 599.

to create a State accident insurance and total permanent disability fund, for coal miners and employees at coal washers in the State of Montana, and providing for the maintenance and management of the same; extending and defining the duties of the State Auditor, and fixing penalties for the violation of the provisions of this Act." See chapter 67, p. 81, Laws of 1909. In order to understand the Act in detail, it seems advisable to quote it in full. It reads as follows:

"Section 1. All workmen, laborers and employees employed in and around any coal mines, or in and around any coal washers in which coal is treated, except office employees, superintendents and general managers, shall be insured in accordance with the provisions of this Act, against accidents occurring in the course of their occupations.

"Sec. 2. All corporations, partnerships, associations or persons engaged in the business of operating any coal mine or coal washers in the State of Montana shall pay to the Auditor of the State, within five days after the monthly wages at the particular mine shall have been paid, one cent per ton on the tonnage of coal mined and shipped, or sold locally, or having been mined is ready for shipment or sale during the month for which the wages were paid; and all persons mentioned in section 1 employed in and about coal mines shall allow to be deducted from their gross monthly earnings one per cent. thereof, the deduction to be made by the agent, manager, or foreman of any corporation, association, partnership, person or persons engaged in the business of operating any coal mine or coal washer, and paid to the State Auditor within five days after such monthly wages have been paid.

"Sec. 3. The agent, manager, foreman or accountant of any corporation, partnership, association, person or persons engaged in mining coal in Montana, shall on or before the fifth day succeeding the pay day at his respective mine, make report under oath to the State Auditor as to the tonnage mined and subject to the payment of one per cent. per ton thereon; and stating the gross earnings subject to the one per cent. deduction as provided in this Act, accompanied by a certified check in full for the amount of the tax provided in section

With the exception of the New York statute, the various Acts have been upheld either in their entirety or in all essential particulars. The New York court, in declaring unconstitutional the Compensation Act of that State, based its decision on the ground that it was a taking of property without due pro-

cess of law. The court said: "All that is necessary to affirm in the case before us is that in view of the constitution of our State the liability sought to be imposed upon the employers enumerated in the statute before us is a taking of property without due process of law, and the statute is therefore void."

2 of this Act. It shall be unlawful for any person, employer, employee, corporation, partnership, association or union to make any contract waiving, avoiding or affecting the full legal effect of this Act.

"Sec. 4. It is hereby made the duty of the State Auditor to receive all moneys as provided for in this Act, and to send the proper acknowledgment to the person making such remittance. The Auditor shall pay all moneys so received by him to the State Treasurer, who shall keep such sums in safe custody in a distinct fund to be known as the employers and employees co-operative insurance and total permanent disability fund. The State Treasurer must invest the surplus of this fund in safe and convertible State, county or city bonds, or bonds of the United States. All interest accruing from such investments shall be accredited to this insurance fund. The bond of the State Treasurer shall be liable for such funds, and it shall be his duty to keep accurate accounts of the receipts and disbursements of such money.

"Sec. 5. The Auditor of State shall keep full statistics of the operation of this function of his department in the event of death by accident of an employee insured under this Act, who shall have come to his death in the course of his employment and by causes arising therein. The Auditor of State upon being satisfied by adequate evidence of such death shall issue a warrant upon the State Treasurer to persons dependent upon the deceased, these warrants to issue in the following order: (1) To surviving wife and child, or children, in equal shares, and if neither wife or child, or children be alive, then (2) to surviving parents who are dependent, or partially so, upon the deceased; if none, then (3) to such other relatives of the deceased as survive him and are dependent upon him, in the sum of three thousand (\$3,000) dollars.

"A workman receiving injuries which permanently incapacitate him from the performance of work shall receive a compensation monthly, not to exceed one dollar (\$1.00) a day for each working day. Compensation for permanent injury shall not be allowed until after the expiration of twelve weeks from the time such injuries were sus-

In view of the recognized desirability, at least from an economic standpoint, of legislation which will afford injured workmen compensation without recourse to litigation, the New York court's conception of "due process of law" has been generally deplored. Apparently an amendment to the New

York Constitution will be required before proper legislation can be enacted. It is unfortunate that our fundamental law may be converted into an obstacle to social and economic justice. The broad words of the Fourteenth Amendment, said the court in *Noble State Bank v. Haskell*, 219 U. S. 104, 81 Sup.

tained, provided that the medical practitioner examines and pronounces the injury as being permanent, compensation may then be allowed from commencement of disability. The Auditor of State, however, may, when in his judgment he deems it advisable, use so much of the funds as is necessary in the procuring of a medical practitioner, for the purpose of examination or treatment under this Act, for such injuries as herein mentioned compensation shall continue during disability, or until settlement if effected as provided for in section 9 of this Act. Total or permanent disability shall consist of the loss of both legs or both arms, the total loss of eyesight or paralysis, or other conditions incapacitating him from work, caused by accident, or injuries received during employment as specified by this Act; provided, that if death, as a result of the injury, ensues at a period not longer than one year from date of accident the sum of three thousand dollars (\$3,000) shall be paid the deceased workman's dependents as hereinbefore provided. The representatives of a foreigner, except the widow or dependent children, who were not living within the country at the time of the accident, shall have no claim for the compensation provided for in this Act. Such foreign person shall file their foreign address, if married, with the office of their employer with whom they are employed and duplicate thereof with the State Auditor, giving their wife's name and dependent children, and such other identification as may be required by the Auditor of State. Loss of any limb or eye, caused by accident to a workman while employed as provided for in this Act, shall be compensated for in the sum of one thousand (\$1,000) dollars, provided, that in the event there shall be no funds available in the fund to pay the Auditor's warrant when drawn the same shall draw interest out of the fund at the rate of ten per cent. per annum until such warrant is called for payment by the Treasurer which shall be as soon as the fund is sufficient to pay the same with its interest when due.

"Sec. 6. Where a workman is entitled to monthly payments under this Act, he shall file with the Auditor of State his application for such, together with a certificate from the county physician of the county wherein he resides, attested before a notary public.

Ct. 186, 55 L. Ed. 112, 32 L. B. A. (N. S.) 1062 (1911), should not be pushed to a drily logical extreme, and, the court continued, the Federal courts will be slow to strike down as unconstitutional legislation of the States enacted under the police power.

The chief grounds of attack upon the

constitutionality of the Compensation Acts are that they violate the constitutional right to jury trials, that they operate to deprive persons of property without due process of law, and that they deny to all equal protection of the laws.

It is well settled that the Federal

"Sec. 7. If any person or persons, company or corporation who is then paying into this insurance fund shall believe that any person or persons are obtaining, or having made application to obtain benefits thereunder improperly or fraudulently, and shall file his written request that such person's claim be investigated, the State Auditor must, upon the receipt of such request request the Secretary of the State Board of Health to make an examination for the purpose of this Act and his certificate as to the condition of the person or persons with reference to their rights to benefit under this Act shall be conclusive evidence as to his condition.

"Sec. 8. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation under this Act shall be suspended until such examination takes place, and shall absolutely cease unless he submits himself for an examination within one month after being required to do so.

"Sec. 9. When any monthly payment has been made to a workman for any period whatever, the liability under this Act may, on the application by, or on behalf of the workman, be redeemed by the payment of a lump sum, which in no instance shall be in excess of the amount specified as death indemnity and all monthly payments made prior shall be deducted from such settlement.

"Sec. 10. The Auditor of State shall report in January of each year to the Governor of the experience and business of this function of his department, and shall have plenary power to determine all disputed cases which may arise in its administration not herein provided for, and to recommend in his report the rates or premium necessary in order to preserve such fund, and shall order paid such indemnification as herein provided. He shall have power to define the insurance provisions of this Act by regulations not inconsistent therewith and shall prescribe the character of the monthly or other reports required of the parties liable hereunder and the character of the proofs of deaths, or to total permanent disability, and shall have power to make all other orders and rules necessary to carry out the true intent of this Act.

"Sec. 11. No money paid or payable in respect of insurance or

Constitution does not guarantee a trial by jury in a civil action brought in the State courts (*Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678). In the New York case the court discussed the question of jury trial, but in view of conflicting opinions on the subject among

the members of the court, the justice who prepared the opinion said that "since the disposition of the questions which it suggests is not necessary to the decision of the case, we do not decide it." In the Massachusetts case the matter of jury trial was not brought

monthly compensation under this Act shall be capable of being assigned, charged, taken into execution, or attached, nor shall the same pass to any other person by operation of law; and the acceptance of pecuniary benefit under the provisions of this Act shall operate to release the person or persons, corporation, partnerships, or associations causing such injuries or death for which benefits are so claimed, who shall have paid the assessment provided in section 2 of this Act, and also the employer, officers and agents thereof from all liability and claim arising from such injuries or death. The commencement of a suit to recover for such injuries or death shall operate as a forfeiture of the right to benefit under this Act.

"Sec. 12. A manager, agent, foreman, accountant, person or persons who represent any corporation, partnership, association, person or persons, engaged in the mining or management of any coal mines or coal washers in Montana, or person or persons liable for the payment herein provided for, who shall violate the intent of this Act by inaccurate reports of tonnage of coal produced by them, or the earnings of employees in their employ, or who in any manner hinders or obstructs the Auditor of State in ascertaining facts bearing upon any case provided for in this Act or who may refuse correctly to make out such reports as are required by this Act, or as requested by the Auditor of State, or submit to its provisions, when liable therefor, or who shall fraudulently obtain benefits hereunder shall be fined for each offense the sum of not less than one hundred (\$100) dollars nor more than five hundred (\$500) dollars and imprisonment in the county jail for a period of not less than one month nor more than six months, or by both such fine and imprisonment.

"The proceeds of all fines shall be forwarded to the State Treasurer and by him credited to the insurance fund.

"Sec. 13. This Act to be in full force and effect from and after the first day of October, nineteen hundred and ten, benefits to commence four months thereafter."

On January 25, 1911, an agreed statement of facts was filed in the District Court for Lewis and Clark county, as follows:

up for consideration and in the Wisconsin case (to be reported in 3 N. O. C. A. [Negligence and Compensation Cases Annotated]), the question was not raised. In the Montana Case the court said that "the adjustment of claims under the Act is an administrative function and not a judicial pro-

ceeding, and it is only in certain cases falling under the latter designating that trial by jury is guaranteed by the Constitution."

In the Washington case (which is to be reported in Vol. 3 Negligence and Compensation Cases Annotated the Supreme Court disposed of the

"Come now the plaintiff and defendant in the above-entitled action, and present and submit to the above-entitled court the following agreed case, containing the facts upon which this controversy depends, as follows, to wit:

"1. That plaintiff is now, and at all times herein mentioned has been, the duly elected, qualified, and acting State Auditor of the State of Montana.

"2. That defendant is, and was at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and is, and was at all times herein mentioned, and particularly during the month of October, 1910, engaged in the business of operating coal mines and coal washers at or near Red Lodge, in the State of Montana.

"3. That on the 20th day of November, 1910, the monthly wages for the month of October, 1910, of all workmen, laborers, and employees of defendant were paid by defendant.

"4. That during the month of October, 1910, defendant mined from its mines at or near Red Lodge, Montana, and either shipped or sold locally fifty-nine thousand six hundred and fifty-one (59,651) tons of coal.

"5. That the gross monthly earnings of all workmen, laborers and employees employed in and around the coal mines of the defendant, and in and around its coal washers in which coal is treated, except its office employees, superintendents, and general managers, for the month of October, 1910, was the sum of \$79,000.47.

"6. That under the provisions of chapter 67 of the Eleventh Session Laws of the State of Montana, entitled 'An Act to create a State accident insurance and total permanent disability fund, for coal miners and employees at coal washers in the State of Montana, and providing for the maintenance and management of the same; extending and defining the duties of the State Auditor; and fixing penalties for the violation of the provisions of this Act'—plaintiff demanded of the defendant one cent per ton on the tonnage of coal mined and either

jury question as follows: "The Act here in question takes away the cause of action on the one hand and the ground of defense on the other and merges both in a statutory indemnity fixed and certain. If the power to do away with the cause of action in any case exists at all in the exercise of the

police power of the State, then the right of the trial by jury is therefore no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the one is to leave the other nothing upon which to operate."

The distinction between compulsory

shipped or sold locally by defendant during the month of October, 1910, to wit, the sum of \$596.51; and demanded of the defendant one (1) per cent. of the gross monthly earnings of all workmen, laborers, and employees employed in and around the coal mines of the defendant, and in and around its coal washers in which coal is treated, except its office employees, superintendent, and general managers, for the month of October, 1910, amounting to \$790, making a total of \$1,386.51; and that defendant has failed and refused to pay said amount, or any part thereof.

"7. That some of the employees of the defendant have protested against the deduction by said defendant of one (1) per cent., or any other amount, from their gross monthly earnings, as provided by said chapter 67; and some of the employees of the defendant have consented to the deduction of one (1) per cent. from their gross monthly earnings, under the provisions of said chapter 67.

"8. That if plaintiff is entitled to recover upon this case he will be entitled to interest on the amount of recovery from the 25th day of November, 1910.

"This controversy is submitted upon the foregoing agreed case, under the provisions of sections 7254, 7255, and 7256, Revised Codes of the State of Montana, for the purpose of determining the constitutionality of chapter 67 of the Eleventh Session Laws of the State of Montana, under the agreed state of facts here presented."

The district court adjudged that the plaintiff, as auditor, have and recover of the defendant the sum of \$1,386.51, with interest thereon from the 25th day of November, 1910, together with costs. From that judgment, the defendant has appealed.

On the part of the appellant it is contended:

(1) The Act does not amount to an exercise of the police power, so called, because not preventive in its nature, and because it does not serve any of the necessary ends of police legislation.

(2) If the subject were one which could be handled under the police power, so called, the Act is class legislation.

compensation laws and those which are optional, is of importance in deciding whether such legislation is void as depriving a person of property without due process of law. In the latter class, the question whether the parties will accept the benefit of the provisions of the Acts, is generally made elective,

and, therefore, the common law rights and defenses are not affected. The optional Acts have all been upheld, except a Maryland statute enacted in 1902, which was declared unconstitutional by the Baltimore Court of Common Pleas in the case of Franklin v. United Rys. & Electric Co., which has

(3) The Act operates to deprive those subject to its terms of their right to trial by jury, guaranteed to them by the Federal and State Constitutions.

(4) The Act operates to take property without due process of law, and violates the provisions of the Federal Constitution, as well as article 3, § 27, of the Constitution of the State of Montana.

(5) In reserving to the employee his right to an action at law, the Act denies to the mine operator the equal protection of the laws.

(6) The provision for payment to an injured employee of his compensation in a lump sum defeats the purpose of the Act itself, viewed as a police regulation.

(7) The Act does not differentiate between a careful and a careless employer.

(8) The Act lodges judicial power in the State Auditor.

We shall not endeavor to consider the points raised in the foregoing order, because it will be noted that many of them comprehend, incidentally, questions of law involved in others.

At the outset, it may be stated that the Act, viewed as a whole, presents certain fundamental propositions, novel in this jurisdiction, which, although they have lately been the subject of serious consideration by courts and students of present day conditions, involving, as they do, grave questions of constitutional law, as well as of economics, are yet so comparatively new in conception that their supposed basic principles have not been recognized as sound by some tribunals and law writers, and may be said not to have been accepted in their entirety by any court. It will not suffice to say that because the theory or design of the lawmaking power, as evidenced by the Act, is one which is not only new in principle, but revolutionary of certain preconceived and deeply rooted notions of lawyers, therefore the Act is unconstitutional. Nevertheless, it is the duty of courts to jealously guard the constitutional rights of the citizen.

It is matter of common knowledge, among lawyers and laymen alike, that our present system of compensation for injury or death of an employee, caused by the actual or imputed negligence of his em-

not been reported. The Maryland Act provided for payment only when the injuries sustained resulted in the death of the employee, and a servant who sustained serious, but not fatal injuries, was not entitled to the benefits of the fund established; the statute also took away his right of action even though

the negligence of the master caused the injury. Thus far two compulsory statutes have been before the courts—the New York and the Washington Acts. The former was declared void, but the latter was sustained.

Apparently if Workmen's Compensation Acts are to be upheld as valid, it

ployer, has given rise to conditions which seem to demand an abrogation of that system. This demand is so widespread and insistent that we shall do well to inquire into the reasons therefor.

In this State, the affirmative defenses of contributory negligence and assumption of risk, including in the latter the negligence of a fellow servant, are still generally available to the employer. The result is that in many cases the maimed employee, and, in case of his death, his dependents, are obliged to bear the whole burden of misfortune. He or they may suffer the humiliation of becoming public charges, with the consequent additional expense to the taxpayer. The injury or death may have been the result of inevitable accident in the course of the employment, in which event the workman is the sole victim. Whatever may be the reason therefor, actions for damages for personal injury and death have increased enormously in number in the past few years. It is notorious that but a small proportion of the moneys forced from the employer in these cases finds its way into the pockets of the plaintiff. The remainder is frittered away in payment of counsel fees, witness fees, court costs, and other necessary expenses of litigation. The records of this court disclose that our best and most high-minded lawyers have, as was their duty, advocated the cause of the plaintiff in many of these cases; nevertheless, the fact remains that the solicitor of personal injury cases is a hateful reality, and much unnecessary and ill-advised litigation results from his activities. These cases are prolific of perjury and subornation of false swearing. They also add a great weight to the burden of the taxpayer. Some plaintiffs have lost meritorious causes, and many defendants, especially public service corporations, have been mulcted in heavy damages in actions where the great preponderance of the evidence was in their favor. Jurors in some communities are, unconsciously perhaps, prejudiced against corporations, as such. In practical application, our present system does not afford the equal protection of the laws to certain defendants. It is impossible not to recognize the fact that the defendant's ability to pay is often used as a basis for calculating the compensation due the plaintiff. Personal injury cases breed class

must be under the police power of the State, whether such laws operate directly or through the agency of the State in the creation of an insurance fund. Such legislation may be regarded as a social and economic need, and as tending toward the conservation of the health and safety of the employees,

and so within the police power of the State. Upon this principle it has been held that one may be liable for injuries done by blasting (*Sullivan v. Dunham*, 161 N. Y. 290, 7 Am. Neg. Rep. 126, 47 L. R. A. 715, 76 Am. St. Rep. 274); or for injuries caused by a ferocious animal (*Muller v. McKesson*, 73 N. Y.

hatred, as between capital and labor, in its most virulent form.

1. Can this statute be upheld as a proper exercise of the police power of the State? We shall first concern ourselves with the police power generally, as applied to the Act. It is contended on the part of the appellant that the measure is not designed to prevent the evils growing out of and incident to the present system of actions for fault, because it does not abolish such actions. We shall discuss this question later, but here it may be suggested that if the act has a reasonable tendency to accomplish the desired result it ought to be upheld, so far as that point is concerned.

We think it cannot be doubted that many employees and dependents of employees who actually have a good cause of action under the common-law and statutory procedure now in force will voluntarily resort to the provisions of the Act to save the expense and delay necessarily incident to litigation in the courts. Be that as it may, the members of the Legislature by whom the Act was passed were evidently of opinion that such a result would or might ensue, and, as the question was one essentially for their determination, the courts ought not to declare otherwise, unless they are able to say that it has no such tendency.

Let us first disabuse our minds of the notion that a claim for indemnity under this Act is either a suit, an action, or a cause of action. It is neither. The Act, as distinctly indicated by its title, provides for a State accident insurance and total permanent disability fund for coal miners. By its terms, a method of compensation is provided for injury or death of a coal miner, regardless of the manner in which the injury was inflicted or the death caused. It ignores, and was intended to ignore, any question of fault on the part of either employer or employee. It provides an insurance for persons who have no cause of action at law, and extends its benefits also to those who have a cause of action, if they so elect. But we may, for the moment, disregard the latter consideration, and treat the Act as simply providing indemnity for those who could not successfully prosecute an action in the courts. So regarded, it is essentially extrajudicial in character.

195, 1 Am. Neg. Cas. 188, 29 Am. Rep. 123); municipal corporations held liable for damages caused by mobs (*Champaign County Com'rs v. Church*, 62 Ohio St. 318, 48 L. R. A. 738); and railroad companies made liable for physical injuries sustained by passengers on their trains (*Chicago, R. I. &*

P. R. Co. v. Zerneck, 183 U. S. 582, 22 Sup. Ct. 229, 46 L. Ed. 339). Belonging to the same class are statutes requiring the killing of diseased cattle, cutting down of diseased fruit-trees, forbidding the sale of unwholesome food, requiring the vaccination of children, prohibiting the sale of dan-

The police power of the State is not to be rigidly defined, or confined to set cases. Mr. Alfred Russell, in his work, *Police Powers of the State* (pages 25 and 26), says: "What the police power is, and what its extent and limitations are, can only be ascertained by the gradual processes of judicial inclusion and exclusion as the cases presented for decision require." Professor Ernst Freund says: "From the mass of decisions, in which the nature of the power has been discussed, and its application either conceded or denied, it is possible to evolve at least two main attributes or characteristics which differentiate the police power: It aims directly to secure and promote the public welfare, and it does so by restraint and compulsion." Freund, *Police Power*, § 3, p. 3. Mr. Justice Holmes, speaking for the Supreme Court of the United States, in *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, said: "If we have a case within the reasonable exercise of the police power, no more need be said. In a general way, the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and predominant opinion to be greatly and immediately necessary to the public welfare."

For the purposes of this case, let us turn from its humanitarian features, and suppose, for the moment, that the sole object of the Act is to prevent persons injured in coal mines, and their dependents, from becoming public charges. Viewed in this light, the private benefits to be derived from the law may be disregarded, and its primary object held to be one of public concern solely. Moreover, it cannot be doubted, we think, that the general welfare of the State and its standing among its sister States, as well as among persons generally, necessarily including those who have money to invest, and those who seek new homes and new locations, depends in a great measure upon its industries and the class and welfare of its wage-workers. Any measure which tends to minimize indigency of necessity raises the general standard of the people; any statute which has a tendency to reduce the present enormous expense of operating our courts would seem

gerous articles, forbidding the publication of obscene literature or pictures, suppressing places of ill-repute, and regulating the manufacture and sale of intoxicating liquors.

The police power should not be regarded as fixed, but rather subject to change according to the changing in-

dustrial and social conditions. The court in the Washington case properly says: "The test of the validity of such a law is not to be found in the inquiry: Does it do the objectionable things? But it is found rather in the inquiry: Is there no reasonable ground to believe that the public safety, health,

to be, presumptively, a proper exercise of the police power. The Supreme Court of Washington, in *State of Washington ex rel. Davis-Smith Co. v. Clausen*, State Auditor [3 Negligence and Compensation Cases Annotated 599], 117 Pac. 1101, while construing and sustaining a compulsory Workman's Compensation Law (Laws 1911, c. 74), said: "The inquiry should be: Is there no reasonable ground to believe that the public safety, health, and general welfare is promoted thereby? It is unnecessary to discuss the origin, nature, or extent of the police power. It is sufficient to say that, by means of it, the Legislature exercises a supervision over matters affecting the common weal, and enforces the observance by each individual member of society of duties which he owes to others and the community at large. The possession and enjoyment of all rights are subject to this power. Under it the State 'may prescribe regulations promoting the health, peace, morals, education, and good order of the people, and legislate so as to increase the industries of the State, develop its resources, and add to its welfare and prosperity.' In fine, when reduced to its ultimate and final analysis, the police power is the power to govern." The court then cited many cases in which statutes creating liability without fault have been upheld. If we are correct in our conclusions, however, these cases have no great pertinency to this branch of the inquiry. They all relate to the protection of private rights. The statute of Washington in terms abolishes all civil actions and civil causes of action for personal injuries incurred in certain extrahazardous employments, and the jurisdiction of the courts therein, except as in the Act provided. And, in so far as the case just cited holds that the Act was a proper exercise of the police power, it is a direct authority in this case, and, we think, reaches a correct conclusion.

Mr. Robert J. Cary, of Chicago, in his brief on the Power of Congress in Respect of Industrial Insurance, at page 51 says: "The body of law involved in the law of torts and employer's liability statutes pertains entirely to the redress of private wrongs. In such instance, liability results in the payment of damages to the employee intended to be commensurate with, and to reimburse him for, the injury suf-

or general welfare is promoted thereby?" The intention of the "due process" clause of the constitution, continued the court, was "to prevent the arbitrary exercise of power, or undue and capricious interference with personal rights; not to prevent those reasonable regulations that all must sub-

mit to as a condition of remaining a member of society." In the case of *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062 (1911), in which the Supreme Court of the United States considered the validity of the Oklahoma Bank Depositors' Guarantee Act,

ferred. Such law has for its sole object and end the regulating of private rights. * * * The obligations, on the other hand, of industrial insurance and workmen's compensation accrue from contingencies not dependent upon or within the control of the parties, and thus have no relation whatever to the conduct of the parties; hence these obligations are not based upon wrongs. It follows, then, that they must pertain to the subject of government regulations, and are in the nature of economic provisions, taking the form of indirect taxation levied to regulate occupations, for on what other basis would the government be justified in writing into the labor contract, against the will of the parties, an insurance policy? Were this not so, industrial insurance or workmen's compensation would be, from the standpoint of both the employee and the employer, without basis of justice or equity; for the theory of such laws is that compensation is not to be commensurate with injury, but is to be based upon wages, thus substituting for the former obligations based upon tort, which offered damages commensurate with injury, a purely arbitrary sum. Such a scheme can have no relation to the adjustment of private wrongs. If it be justifiable, it must be on the sociological theory of the right of the State to levy a tax for the purpose of protecting, from an economic standpoint, the community as a whole."

The Supreme Court of the United States, in the case of *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385, used this language: "The extent and limits of what is known as the police power have been a fruitful source of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement by summary proceedings, of whatever may be regarded as a public nuisance. Under this power, it has been held that the State may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways

Mr. Justice Holmes said: "In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purposes, is a private use. * * * It would seem that there may be other cases besides the

every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."

It is generally admitted by jurists and economists that Workmen's Com-

and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane, or those affected with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." And, again, in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, the court said: "This court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the States methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection. * * * While the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuations, and the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare, without bringing them into conflict with the supreme law of the land."

In our judgment, the general scheme of this Act is well within the

pensation Laws are economically sound, and they are being adopted in all enlightened countries. "If, therefore," said the court in the Washington case, "the Act in controversy has a reasonable relation to the protection of the public health, morals, safety, or welfare, it is not to be set aside because it may incidentally deprive some person of his property without fault or take the property of one person to pay the

obligations of another. To be fatally defective in these respects, the regulation must be so utterly unreasonable and so extravagant in nature and purposes as to capriciously interfere with and destroy private rights."

For a well-prepared treatise on the subject of *Workmen's Compensation Acts* in general, see *Bailey on "Personal Injuries,"* Vol. 3, § 857 et seq.

police power of the State. If the people, represented by their Legislature, are of opinion that the public interests demand that industrial insurance ought to be substituted, in whole or in part, for actions for wrongs, this court certainly cannot say that they are in error.

2. But it is contended that the Act is an example of class legislation, and several reasons are urged in support of this contention. The first is that it singles out one particularly hazardous employment, and subjects it to burdens not placed upon other extrahazardous employments within the State. The Legislature has declared, in effect, that coal mining is a dangerous and extrahazardous business, and we think it is generally known to be so. The Court of Appeals of New York, in *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 1 N. C. C. A. [Negligence and Compensation Cases Annotated] 517, 94 N. E. 431, disposed of this question, correctly we think, as follows: "The appellant contends that the classification in this statute of a limited number of employments as dangerous is fanciful or arbitrary, and is therefore repugnant to that part of the fourteenth amendment to the Federal Constitution which guarantees to all our citizens the equal protection of the laws. Classification, for purposes of taxation, or of regulation under the police power, is a legislative function, with which the courts have no right to interfere, unless it is so clearly arbitrary or unreasonable as to invade some constitutional right. A State may classify persons and objects for the purpose of legislation, provided the classification is based on proper and justifiable distinctions, and for a purpose within the legislative power. There can be no doubt, we think, that all of the occupations enumerated in the statute are more or less inherently dangerous to a degree which justifies such legislative regulation as is properly within the scope of the police power. * * * The mandate of the Federal Constitution is complied with if all who are in a particular class are treated alike; and that, we think, is the effect of this classification." See, also, *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *Magoun v. Illinois T. & S. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037.

In the case of *Quong Wing v. Kirkendall*, 39 Mont. 64, 101 Pac. 250, this court said: "The Legislature is presumed to have exercised a reasonable discretion in making the classification, and the courts ought not to interfere with the action of this co-ordinate branch of the government, until the (party) upon whom rests the burden of proof clearly shows that he is denied the equal protection of the laws. Every intendment is in favor of the validity of the legislative action. In other words, the classification is presumed to be reasonable."

The fact that coal mining is alone selected from numerous other

dangerous employments is not at all significant. Legislation of this nature is in its infancy, and if it be found adequate to correct the evils growing out of the present system it may gradually be extended to apply to all extrahazardous employments. So long as all persons operating coal mines are treated alike, no one of them has cause of complaint. The same may be said of coal miners. See *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145, and *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107.

3. Before proceeding to discuss the other questions involved, it may be well to fix the *status* of the parties to whom the Act applies, to wit, operators of and employees in coal mines, as indicated by the Act itself. We hold to the following propositions:

(1) That the right to exercise police authority as such over the operator arises, in part at least, from the fact that he is engaged in an extrahazardous business, which may, by reason of the liability of his employees to injury therein, resulting in death or partial or permanent disability, cause them to become public charges, thus lowering the standard of citizenship and increasing the general burden of taxation; and from the further fact that our present system of common-law and statutory actions greatly increases the expense of maintaining our courts, causes a vast economic waste, and tends to create breaches and dissensions between employer and employee which would otherwise not exist. *St. Louis Con. Coal Co. v. Illinois*, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872. The latter consideration is one pertaining to the peace, order, and morals of the community, which are universally recognized as subject to control and regulation by the State. *State v. Penny*, 42 Mont. 118, 111 Pac. 727.

(2) The exercise of the police power is properly and necessarily supplemented by the taxing power of the commonwealth, in order to carry the general plan into practical effect. Or, perhaps, it is more accurate to say that the power to tax for the purposes of the Act is necessarily included in the police power. It will readily be seen that, unless the power to impose taxes upon the extrahazardous industry can be invoked to create an insurance fund, the Act is nugatory.

Beyond doubt, there can be no lawful tax which is not laid for a public purpose. What is a public purpose? Having determined that the general design of the Act may be upheld as a proper exercise of the police power—that is, as being a scheme which may result to the public welfare—we are justified, perhaps, in accepting as a corollary the conclusion that the tax imposed is for a public purpose. Again, if the Act abolished actions and causes of action for personal injuries and death, the tax might be justified on the theory that the State had

given a *quid pro quo* to the employer. But such is not the situation with which we have to deal. As a matter of fact, the tax is imposed for the purpose of creating a fund to indemnify certain individuals and classes of individuals, and actions at law are not abolished. It is imposed on an extrahazardous employment for the presumed reason that such employment is pregnant with possibility of injury to the employee. The business of coal mining is not unlawful or immoral; on the contrary, it is lawful and necessary. But it is extremely dangerous and therefore subject to regulation. The tax cannot be likened to a special assessment for local improvements, for the reason that such an assessment is primarily a lien upon the property benefited, and also because the supposed justification for such assessment rests in the idea that the owner receives a direct, substantial return for such tax in the enhanced value of his property. In our judgment, the better reasoning leads to the conclusion that this impost is an employment tax upon the occupations of operating and working coal mines. It is not at all necessary to justify the imposition of such a tax that the business itself should particularly require police supervision, although, as we have seen, extrahazardous enterprises may demand restraint and regulation. Such a tax may be imposed, either for regulation or revenue, or for both. Property and occupation are alike legitimate objects of taxation. See § 1, art. 12, of the State Constitution.

The Supreme Court of Wisconsin, in *Brodhead v. City of Milwaukee*, 19 Wis. 658, 88 Am. Dec. 711, held that a tax imposed for the payment of bounties to volunteers who might enlist in the service of the United States during the Civil War was for a public purpose. Mr. Chief Justice Dixon said: "The objects for which money is raised by taxation must be public, and such as conserve the common interest and well-being of the community required to contribute. To justify the court in arresting the proceedings and declaring the tax void, the absence of all possible public interest in the purposes for which the funds are raised must be clear and palpable—so clear and palpable as to be perceptible to every mind at the first blush. In addition to these, I understand that it is not denied that claims founded in equity and justice in the largest sense of those terms, or in gratitude or charity, will support a tax. Such is the language of the authorities. I think the consideration of gratitude alone to the soldier for his services * * * will sustain a tax for bounty money to be paid him or his family. * * * It is a matter which ultimately concerns the public welfare, and that nation will live longest in fact, as well as in history, and be most

prosperous, whose people are most sure and prompt in the reasonable and proper acknowledgment of such obligations."

The Supreme Court of Connecticut, speaking to the same subject, in *Booth v. Town of Woodbury*, 32 Conn. 118, said: "In the first place, if it be conceded that it is not competent for the legislative power to make a gift of the common property, or of a sum of money to be raised by taxation, where no possible public benefit, direct or indirect, can be derived therefrom, such exercise of the legislative power must be of an extraordinary character to justify the interference of the judiciary; and this is not that case. Second, if there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy, and not of natural justice, and the determination of the Legislature is conclusive. Such gifts to unfortunate classes of society, as the indigent blind, the deaf and dumb, or insane, or grants to particular colleges or schools, or grants of pensions, swords, or other mementos for past services, involving the general good indirectly and in slight degree, are frequently made and never questioned."

Judge Cooley, in his *Constitutional Limitations* (7th Ed. p. 698), says this: "Not only are certain expenditures absolutely essential to the continued existence of the government and the performance of its ordinary functions, but, as a matter of policy, it may sometimes be proper and wise to assume other burdens which rest entirely on considerations of honor, gratitude, or charity. There will therefore be necessary expenditures, and expenditures which rest upon considerations of policy only, and, in regard to the one as much as to the other, the decision of that department to which alone questions of State policy are addressed must be accepted as conclusive."

No one has ever thought to question the power of the Legislature to erect memorials to certain distinguished citizens of Montana who have passed away. The erection of these memorials was actuated entirely by sentiment, but who shall deny that their contemplation has a tendency to raise, or at least to maintain, our general standard of citizenship?

The fact that the Act operates to the direct benefit of the injured employee or his dependents does not of itself characterize the measure as one for private purposes only. We think the considerations to which we have heretofore adverted demonstrate that the provisions of the Act disclose the fact that its enactment may have been so far a matter of public concern, involving the general good and welfare, that the Legislature, in carrying forward the policy of the State, directed by a clearly defined, dominant public opinion, was warranted in

declaring, by implication, that the purpose for which the tax is imposed is a public one. This being so, the courts have no power to declare otherwise.

4. Is the right to trial by jury denied? Article 7 of the amendments to the Constitution of the United States does not guarantee a trial by jury in a civil action in a State court. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678. Section 23 of article 3 of the State Constitution provides that the right of trial by jury shall be secured to all, and remain inviolate. This provision has been construed by this court as applying only to those cases wherein a right of trial by jury existed at the date of the adoption of the Constitution. *Montana Ore Pur. Co. v. Boston & Mont. Con. C. & S. Min. Co.*, 27 Mont. 288, 70 Pac. 1114. Section 23 of article 3 of the Constitution, *supra*, refers in terms to "civil cases" and "criminal cases." We shall not concern ourselves with the origin and growth of actions for fault. Suffice it to say that they were known to the common law, and are popularly referred to as common-law actions. It was a rule of the common law, speaking generally, that for the death of one person caused by the wrongful act of another, there was not any remedy by civil action. Because of the harshness of this rule, the English Parliament, in 1846, enacted a statute known as "Lord Campbell's Act" [9 and 10 Vict. c. 93], and this Act is the model after which a like statute has been enacted in nearly every American State, including Montana. See *Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960. The Legislature of 1903 passed an Act rendering railroad companies liable for injuries to employees caused by the negligence of certain other employees (see *Laws of 1903*, p. 157), and the Legislature of 1905 further enlarged the common-law liability of persons or corporations operating railroads (see § 5152, *Rev. Codes*). Many other instances might be cited from our own statutes. There can be no doubt of the power of the Legislature to abolish these provisions by repealing the statutes. Indeed, all of our actions for wrongs may be regarded as in some degree statutory. The Court of Appeals of New York, in the *Ives Case*, *supra*, [*Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 1 N. C. C. A. 517], held that the Legislature had power to abolish the fellow servant rule and the law of contributory negligence, as applied to injuries to servants, and also to a limited extent to regulate the application of the doctrine of assumed risk. The Legislature may alter or repeal the common law. *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323. Many rules of the common law are abolished by our Code; and § 8060, *Revised Codes*, expressly declares that in this State there is no common law in any case where the law is declared by the Code or the

statute. We find nothing in the Constitution to indicate that it is incumbent upon the Legislature to preserve the present system of actions for negligence so as to cover future happenings. And see *Martin v. P. & L. E. R. Co.*, 203 U. S. 214, 27 Sup. Ct. 100, 51 L. Ed. 184; *A. T. & S. F. Ry. Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695; *Sawyer v. E. P. & N. E. Ry. Co.*, 49 Tex. Civ. App. 106, 108 S. W. 718.

The right of trial by jury, which is secured and protected by the Constitution, refers to the trial of cases, actions, or suits at law (see *Koppikus v. Capitol Commissioners*, 16 Cal. 249), and has no reference to claims against an indemnity fund, such as are provided for by this Act, or demands by the State Auditor for occupation taxes. There is not anything in the Constitution guaranteeing a right of trial by jury in case of demand for a license or occupation tax. The adjustment of claims under the Act is an administrative function and not a judicial proceeding, and it is only in certain cases falling under the latter designation that trial by jury is guaranteed by the Constitution. "Due process of law" does not necessarily require a jury trial. *Montana Co. v. St. Louis Min. Co.*, 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398.

5. This brings us to the question, Does the system and machinery provided in the Act constitute due process of law? The phrase "due process of law" does not necessarily mean by a judicial proceeding. In the case of *Den v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L. Ed. 372, the Supreme Court of the United States decided that a sale of land by a marshal of the United States on a distress warrant was due process of law. That case contains a very interesting and instructive discussion of the subject. But we need go no further than to inquire whether the collection of an occupation tax in the summary manner provided by the Act affords due process of law. This question is set at rest, as to taxes generally, by the case of *Kelly v. City of Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658, wherein the court said: "Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people have established a different procedure, which, in regard to that matter, is, and always has been, due process of law." See, also, *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. 324, 33 L. Ed. 772.

The case of *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335, was an action to enjoin the collection of a license tax. The court, in affirming a judgment of the Supreme Court of Louisiana, dissolving a preliminary injunction, said: "The mode of assessing taxes in the

States by the Federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done. * * * It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax." The opinion then proceeds to show that under the laws of the State of Louisiana the person assessed has a remedy by application to the courts, if he be wrongfully taxed. Our statute (section 2741, Revised Codes), by necessary implication, provides a remedy by injunction in cases where the tax demanded is illegal or not authorized by law; and section 2742, Revised Codes, providing for payment of "taxes, licenses and other demands for public revenue" under protest, the amount to be later recovered in an action at law, is, we think, applicable to unauthorized demands by the State Auditor. In the case of *Chauvin v. Valiton*, 8 Mont. 459, 20 Pac. 658, 3 L. R. A. 194, this court, speaking through Chief Justice McConnell delivered a very exhaustive opinion concerning "due process of law." The views therein expressed accord with those of other courts on the subject, and seem determinative of the question we are considering. See, also, *McMillan v. City of Butte*, 30 Mont. 220, 76 Pac. 203.

6. The contention that the provision for payment to an injured employee of his compensation in a lump sum defeats the purpose of the Act, viewed as a police regulation, is untenable. It may be that in some instances the employee will dissipate and waste the money so paid, and will thereby render himself indigent; but there is not any presumption that he will do so, and in many instances, we think, such will not be the case. Many employees will undoubtedly conserve the amount received, and use the same for future maintenance and support. We are aware that there is considerable criticism of proposed legislation containing provisions similar to the one we have in mind, but the matter is not for judicial decision. The expediency of the measure in this regard was for legislative determination exclusively.

7. Again, it is argued the Act does not differentiate between a careful and a careless employer. We think this argument is fully answered by the decision of the Supreme Court of the United States, in *Noble State Bank v. Haskell*, [219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062], *supra*. Moreover, the case is authority for several of the conclusions reached in this case.

8. But, it is said, the Act lodges judicial power in the State

Auditor. What has heretofore been said applies in large measure to this contention. Indeed, many of the questions involved in the case are so interwoven that it is difficult to determine where one ends and another begins. Let it be noted, however, that the Act is almost, if not completely, automatic in practical working. The amounts to be paid by the operator, based as they are upon the tonnage of coal mined and shipped, or sold locally, or mined and ready for shipment or sale, are easy of computation, as is also the amount to be deducted from the wages of the workmen, to wit, 1 per cent. thereof. The sum to be paid in case of death is fixed and certain, as are also the person or persons to whom it shall be paid. In case of injury, the amount of compensation is also fixed, dependent upon the character and extent of the injury. The Auditor has power to formulate rules and regulations, not inconsistent with the provisions of the Act. In case of death of a workman, he may require satisfactory evidence of such death, and all applications for monthly payments under the Act must be accompanied by a certificate from the county physician, and be attested before a notary public. We think these provisions insure, *prima facie*, protection to the fund in the hands of the Auditor. It is also provided that if any person, company, or corporation who is a contributor to the fund shall believe that an improper or fraudulent claim has been made thereon, the Secretary of the State Board of Health must investigate the matter, and his determination shall be conclusive.

It may be, considering the novel character of this legislation, that the Auditor will encounter some slight obstacles in performing his duties. The difficulties which he may thus meet, however, will relate more to the details of administration than to any fundamental defect in the act itself, and, we have no doubt, may be to a great extent minimized by the promulgation of reasonable rules and regulations for the conduct of his office, as well as for the guidance of contributors to and claimants against the fund. After all, such considerations are pre-eminently for the legislative branch of the government to deal with. Possibly time and experience will demonstrate that amendments to or changes in the Act will be advisable; but, as was well said by the Supreme Court of Washington, in the Clausen Case, [State ex rel. Davis-Smith v. Clausen, State Auditor, 117 Pac. 1101, 3 Negligence and Compensation Cases Annotated], *supra*: "The courts cannot do otherwise than put it to the test of practice." If we are correct in our former conclusions that the Act affords due process of law, and the right of trial by jury has not been violated, then it seems clear that any controversy which may arise concerning

the mere administrative duty of collecting and distributing the fund may be decided in such summary manner as the State shall prescribe. To again quote from Mr. Cary's able brief (page 134): "The government may prescribe summary methods of adjudication through its administrative officers whose decisions shall be conclusive; or it may provide, as was suggested in *Den v. Hoboken Land & Improvement Co.*, [18 How. 272, 15 L. Ed. 372], *supra*, that the controversy shall take a judicial form, and be determined by such remedial procedure as the government shall create for this purpose." Regarded as an Act to provide a fund for the benefit of certain employees and their dependents, who would otherwise be remediless, we have no doubt that it is within the power of the Legislative Assembly to intrust the administration of the fund to such official as it may see fit.

The fact that one who has a cause of action at common law may elect to take under the Act, and the suggestion that as to him the Auditor may be called upon to exercise judicial power, has no persuasive force when we consider that such election is altogether voluntary, and he may resort to the courts if he so desires. If the tax provided for in the Act can legally be exacted from the employer, and, as is the case, the acceptance of its benefits by the claimant *ipso facto* operates to release the employer from liability, it is difficult to see how the latter has any further concern in the matter of distribution of the fund than to be assured, as the Act provides he may be, that it is not paid out on improper or fraudulent claims. If the summary method of administration provided may not be resorted to, then one of the paramount reasons for this class of legislation must be entirely eliminated from consideration. It seems to us that the opinion of the Supreme Court of the United States, in *Den v. Hoboken Land & Improvement Co.*, [18 How. 272, 15 L. Ed. 372], *supra*, effectually disposes of this question, as well as of some others which we have considered. As this opinion is already too long, however, we shall content ourselves with a single quotation therefrom: "Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extra-judicial remedies for both."

9. Contention No. 5, *supra*, has been reserved for final consideration, for the reason that, while the question raised thereby is by no means so fundamental in character as many of those already disposed of, it is nevertheless decisive of the case. It is therein contended that in reserving to the employee his right to an action at law the Act denies to the mine operator the equal protection of the laws. We have decided that the fact that actions at law are not abolished by the Act is not, of itself, a sufficient reason for declaring the statute unconsti-

tutional. We do not believe "that for the purpose of determining the validity of the tax it is necessary to find an immediate specific benefit to the individual taxed," as is maintained by some writers on the subject. We think we have already shown that if the Act can be justified at all it must be upon a much broader principle than that above indicated. The duty to make payments as provided in section 2 is absolute and unconditional. It can be enforced by appropriate action. But, after full compliance with the terms of the Act, the employer is not exonerated from liability. He may still be sued and compelled to pay damages in a proper case. No provision is made for reimbursement in whole or in part. The injured employees of one operator may all resort to the indemnity fund, while those of another may elect to appeal to the courts. The result is that the employer against whom an action is successfully prosecuted is compelled to pay twice. He has fully paid his assessments under the Act, and is also obliged to pay damages. This fact is so palpable as to be needless of discussion. The Act in this regard is not only inequitable and unjust, but clearly illegal and void, as not affording to such employer the equal protection of the laws. The Legislature of the State of Washington guarded against this contingency by abolishing all actions for negligence. Chapter 74, Sessions Laws, Washington, 1911. The General Assembly of Maryland, in an Act somewhat similar to ours (see Pub. Loc. Laws of Maryland 1910, c. 153, § 10), provided: "If any suit or action be brought against any operator for or in respect of any injury or disability received by an employee while in the discharge of his duty or for death resulting therefrom * * * and said operator shall appear and defend such suit or action and a judgment shall be rendered against him, he shall, after satisfying said judgment * * * be entitled thereafter to deduct from the payments required to be made by him * * * a sum equal to the amount of said judgment and costs."

The manner in which the equal protection of the laws shall be afforded to the operator is, of course, for the legislative body to determine; but some method must assuredly be provided to protect him from double payments. The Act in its present form is, in this regard, so repugnant to all ideas of equity and equality that it must, we think, appeal to every right-thinking person, on the most cursory examination, as unjust. It was to guard against such legislation as this, as we apprehend, that the framers of all American Constitutions guaranteed to the citizen the equal protection of the laws.

The judgment is reversed, and the cause is remanded, with directions to enter a judgment for the defendant.

Reversed and remanded.

BRANTLY, C. J., concurs.

HOLLOWAY, J. I concur in the result but prefer not to express an opinion at this time upon some of the questions discussed, as I do not deem a determination of them necessary to a decision of the case presented.

TRAVELERS' INSURANCE CO. V. GREAT LAKES ENGINEERING WORKS CO.

[U. S. CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, S. D., OHIO, JANUARY 3, 1911.]

184 Fed. 426.

1. Pleading—Sufficiency—Construction—Employer's Liability Insurer—Subrogation.

In an action brought by an employer's liability insurer which had paid a loss incurred by an assured as the result of the death of an employee caused by the negligence of a third party, to recover against the latter under the right of subrogation, petition held to state a cause of action, as against a demurrer, under the provisions of Ohio Rev. Stat., 1908, § 5096, which provides that the allegations of a pleading shall be liberally construed with a view of substantial justice between the parties, and of § 5088, which gives the right to require pleadings to be made more specific and certain by amendment.

2. Insurance—Employer's Liability—Subrogation—Right of Action Against One Causing Loss—Extent of Recovery.

An employer's liability insurer which has paid a loss sustained by a brewing company as the result of an injury to one of its employees and the death of another, who were without fault on their part, due to the blowing out of a cylinder head of a defective engine which was being installed by an engineering company in a refrigerating plant belonging to the brewing company, is entitled, under the right of subrogation, to maintain an action against the engineering company to recover a sum corresponding to the amount of the assured's right of action against the engineering company, and such right of action by the insurance company is not affected by the fact that the liability of the brewing company in one case was statutory and existed in favor of certain persons only.

3. Insurance—Employer's Liability—Subrogation—Real Party in Interest—Right of Action.

An Ohio statute (Rev. Stat. 1908, § 4993), which provides that "an action must be prosecuted in the name of the real party and interests," does not bar the right of an employer's liability insurer to maintain an action at law in its own name against the party whose negligence caused a loss, based on a claim which it has paid in full, since by such payment it became subrogated to the right of action of the assured against the party whose negligence caused the injury.

4. Insurance—Employer's Liability—Subrogation—Action Against One Causing Death—Judgment.

Before an employer's liability insurer, which has paid in full a loss sustained by an assured as the result of the death of an employee, is entitled to recover under the right of subrogation from the party whose negligence caused such death, it is not essential to such right of recovery that a judgment should have been recovered against the assured before the claim was paid, since the only effect of such judgment would be by way of evidence establishing liability.

NOTE.

On the subject of Liability of a Master for the Act of a Stranger, see note in 8 Am. Neg. Rep. 107.

And on the same subject, see the

Master and Servant Cases, reported in Vols. 13-16 Am. Neg. Cas., where the same are grouped and classified according to topics, from the earliest period to 1896.

In error to the Circuit Court of the United States for the Southern District of Ohio, to review a judgment rendered in favor of defendant sustaining a demurrer to plaintiff's petition in an action brought by an employer's liability insurer, which has paid a loss sustained by an assured, to recover the amount so paid from the party whose negligence caused the loss. Reversed.

For plaintiff in error—Robertson & Buchwalter (C. D. Robertson, of counsel).

For defendant in error—Louis J. Dolle, and James B. O'Donnell.

Before WARRINGTON and KNAPPEN, Circuit Judges, and DENISON, District Judge.

KNAPPEN, Circuit Judge. The writ of error in this case is brought to review the judgment of the Circuit Court sustaining a demurrer to plaintiff's petition and dismissing the same. The petition alleges, in substance, that through the negligence of the defendant engineering company with respect to the construction and installation of a refrigerating machine and steam engine, which it was engaged in manufacturing, furnishing, and installing in the place of business of the Herancourt Brewing Company, and while the engine was being operated by the permission and direction of the engineering company, the cylinder head of the engine blew out, "causing the almost instant death of Joseph Leinhart, an oiler in the employ of the Herancourt Brewing Company, and wounding and seriously injuring Edward Wund, another employee of said brewing company, while said employees were in the discharge of their duty," and without negligence or fault on their part; that the brewing company "had no knowledge of, and in the exercise of ordinary care had no means of knowledge of, the said defects, negligent construction, and assembling of said engine, or of the careless and negligent manner in which it was installed;" that by reason of said injuries, due to the negligence or fault of the engineering company, the brewing company became liable to the injured parties and their legal representatives by way of damages as compensation for such injuries; that the brewing company was at the time indemnified, under plaintiff's policy of employer's liability insurance, "against loss by reason of liability imposed by law upon it for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered by reason of the operation of its business, by any person employed by it at its place of business," the policy containing a provision that plaintiff "shall be

subrogated in case of payment of loss under this policy to the extent of such payment to all rights of recovery for such loss by the assured, against persons, corporations or estates;" that plaintiff, in compliance with its insurance contract, "as it was in duty bound," "was required, and did at great expense, appear for, defend, and settle the suit of Margaret Leinhart, administratrix," against the brewing company on account of damages for such alleged wrongful death, "having to pay in satisfaction thereof the sum of \$2,750 and court costs in the sum of \$15; and having to pay in satisfaction of the claim of Edward Wund, a minor, the sum of \$75 and court costs, in the sum of \$15." The petition prayed judgment for these amounts, as well as for attorney's fees "in the litigation and settlement of said claims," and for the time and services of plaintiff's officers and employees" in connection with and given to the said litigation and adjustment of said claims."

The ground of demurrer to the petition generally, as well as specially to so much of it as seeks recovery on account of the Leinhart claim was that it failed to state facts sufficient to constitute a cause of action; it being also assigned that the cause of action is below the jurisdictional amount, this objection being directed to the fact that the claimed recovery aside from the Leinhart claim did not amount to \$2,000. The court below held that the brewing company could have no right of action against the engineering company for damages which it had to pay growing out of the wrongful death of Leinhart, for the reason that only the administratrix of the deceased could have recovered against either or both wrongdoers, and, as the insurance company could recover against the engineering company only in the right of the brewing company, the action could not be sustained. It is over the correctness of this ruling that the important question arises.

Before proceeding, however, to its discussion, reference must be made to certain objections urged against the sufficiency of the petition in other respects, but not passed upon by the court below. It must be admitted that if the petition were to be tested by the rules applicable to common-law pleadings, which require that they be construed most strongly against the pleader, it would be subject to some, at least, of the criticisms made against it. The Ohio statute, however (Rev. St. 1908, § 5096), provides that: "The allegations of a pleading shall be liberally construed, with a view to substantial justice between the parties."

And under this statute it has been held that the rule of the common law above referred to has been abrogated (Hall v. Plaine, 14 Ohio St. 417, 422; Crooks v. Finney, 39 Ohio St. 57, 58); and that pleadings

under the present system must be fairly and reasonably, not strictly, construed (*McCurdy v. Baughman*, 43 Ohio St. 78, 1 N. E. 93). By § 5088 provision is made for requiring pleadings to be made more definite and certain by amendment, and it has been held that defects of allegation which do not amount to such an absolute omission of fact as to constitute no ground of action or defense must be taken advantage of or objected to by motion. *Trustees, etc., v. Odlin*, 8 Ohio St. 293, 296. We think that under this liberal rule the petition may, for the purposes of demurrer, fairly be construed as intended to charge that the accident occurred through the negligence of the engineering company; that as between it and the brewing company the latter was not negligent; that the brewing company, however, became legally liable through its relations with the engineering company, which are not definitely alleged to be those of an independent contractor; that the injuries in question were accidentally suffered by reason of the operation (within the meaning of the indemnity contract) of the brewing company's business by persons employed by it thereat; that the brewing company, as between it and the injured employees or their representatives, was bound to make the payments here sued for, the plaintiff, as between it and the brewing company, being liable thereto.

It is to be remarked, in passing, that the question whether the relation of the engineering company toward the brewing company was or was not in fact that of independent contractor is, of course, open for determination upon the evidence as it shall appear upon the trial.

We are thus brought to the question whether the insurer, by reason of a contract of indemnity against employer's liability, such as exists here, can maintain an action against a third party whose negligence has caused liability to the insured employer for injuries resulting in the death of its employee.

The rule is well settled, in fire insurance as well as in marine insurance, that the insurer, upon paying to the assured the amount of a loss on the property insured, is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss; this right of the insurer against such other person not resting upon any relation of contract or of privity between them, but arising out of the nature of the contract of insurance as a contract of indemnity derived from the assured alone, and enforceable in his right only. *Hall v. Railroad Co.*, 13 Wall. (U. S.) 367, 20 L. Ed. 594; *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; *Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 312, 320, 6 Sup. Ct. 1176, 29 L. Ed. 873; *Liverpool, etc., Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *St. Louis, etc., Ry. Co. v.*

Commercial Union Ins. Co., 139 U. S. 223, 235, 11 Sup. Ct. 554, 35 L. Ed. 154; Cooley's Briefs on the Law of Insurance, vol. 4, p. 3893; Newcomb v. Insurance Co., 22 Ohio St. 382, 387, 10 Am. St. Rep. 746. In United States Casualty Co. v. Bagley, 129 Mich. 70, 87 N. W. 1044, 55 L. R. A. 616, 95 Am. St. Rep. 424, the plaintiff, which had paid a damage resulting to the tenant by an accidental discharge or leakage of water from an automatic fire extinguishing apparatus, was permitted to recover against the landlord as the one liable to the tenant therefor.

But it is insisted by defendant that the brewing company could have no right of action against the engineering company for causing the death of Leinhart, for the reason that there is no common-law right of action for causing the death of a human being, the right of action being purely statutory—in Ohio the action being required to be brought in the name of the personal representative of the deceased, and for the exclusive benefit of the wife, husband, children, parents, or next of kin of the deceased (Rev. St. Ohio 1908, §§ 6134, 6135)—and that the injury to the insurance company from the death of Leinhart is thus too indirect and remote to give a right of action to the insurance company. The cases of Insurance Co. v. Brame, 95 U. S. 754, 24 L. Ed. 580, and Connecticut Mutual Life Ins. Co. v. N. Y. & N. H. Ry. Co., 25 Conn. 265, 65 Am. Dec. 571, are among the most important of the cases relied upon in support of this proposition. It was upon the former of these cases that the learned district judge rested his denial of plaintiff's right to relief. In our opinion, none of the cases cited support the proposition referred to. In the Brame Case the insurance company sought to recover against Brame for the wrongful killing of one McLemore, on whose life the plaintiff had issued a policy of insurance which it was thereby compelled to pay. It was held that as there was at common-law no right of action against Brame for the killing of McLemore, and as the statute creating the right of action gave it only in favor of the minor children or widow, or other relatives of the deceased, the fact that the killing of McLemore "happened to injure the plaintiff was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act of killing," and so gave the insurance company no right of action. The question of subrogation was not referred to, as the insurance contract there involved was not one of indemnity to those injured by the death, but was a wagering contract. The principle of subrogation could have no application to that case, because rights thereunder must have been asserted in the name of the insured, and whatever right of action he may have had abated with his death. In the New York & New Haven Railroad Case, the insurance company sought to recover

damages for the negligent killing of Dr. Beach, whose life was insured by plaintiff's policy, which it was thereby compelled to pay, and the denial of relief was put upon substantially the same ground as in the Brame case. In this case, likewise, the doctrine of subrogation was not involved. On the contrary, the court distinguished the case before it from one involving the right of subrogation in this language:

"The cases in which insurers have been permitted to recover against the authors of their losses are not in contravention of this principle. They have recovered, not by color of their own legal right, but under a general doctrine of equity jurisprudence, commonly known as the doctrine of subrogation applicable to all cases wherein a party who has indemnified another in pursuance of his obligation so to do succeeds, and is entitled to the cession of all means of redress held by the party indemnified against the party who has occasioned the loss."

The case before us is readily distinguished from both the cases we have referred to. It is a general rule of law that a principal or employer is civilly responsible for wrongs committed by his agent or servant while acting within the scope of the employment of the agent or servant. 1 Thompson on Negligence, §§ 518, 520, 526. The rule of law is likewise general that where a principal or employer is not in fault, but has nevertheless been compelled to pay damages to a third person for the negligence of his agent or employee, he may maintain an action over against such servant or employee to recover what he has been compelled to pay. Story on Agency (9th Ed.) § 217; 4 Thompson on Negligence, § 3870. The brewing company thus had, by virtue of its alleged relations with the engineering company, a right of action over against the latter for negligence on its part which caused legal damage to the brewing company. The injury to the brewing company resulting from that negligence was direct and immediate.

With respect to injuries not causing death, as in the case of Wund, we apprehend this proposition would not be questioned. With respect to the damage resulting from Leinhart's death, the fact that Leinhart had no right of action is immaterial. There is no attempt to recover here in any right of his. The ground of the recovery sought is that the engineering company failed in its primary and positive duty toward the brewing company, whereby the latter company sustained a loss. It can make no difference with its right of action over that the original recovery against it belonged to one person rather than another; to the widow and children rather than to the representative of Leinhart's estate. Under the allegations of the petition, the negligence of the engineering company was the direct and sole cause of Leinhart's

death, and thus of the damages suffered by the brewing company. The injury to the insurance company was thus not indirect or remote, but was direct and immediate, because it stands in the shoes of the brewing company. We know of no reason, either upon principle or authority, why the doctrine of subrogation, which has been expressly held applicable to indemnity by way of fire and marine insurance, and by at least necessary implication in the case of casualty insurance, should not be held to extend to employer's liability indemnity. *State v. Ætna Life Ins. Co.*, 69 Ohio St. 317, 69 N. E. 608, is cited by defendant to the proposition that employer's liability insurance is really accident insurance, and so should be classed with ordinary life and accident policies as not being indemnity insurance. The case is not authority for that proposition. The fact that the original right of action against the brewing company was statutory is certainly immaterial. For one example, out of many: In *Hart v. Western Railway Corp.*, 13 Metc. (Mass.) 99, 46 Am. Dec. 719, the insurance company was held entitled to recover on account of a fire loss which it had paid and for which the railroad company was made liable by statute.

But it is contended that this right of subrogation, if it exists, can, in a court of law, be enforced only in the name of the insured. In several cases (including *Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 321, 6 Sup. Ct. 1176, 29 L. Ed. 873, and *Connecticut Mutual Life Ins. Co. v. N. Y. & N. H. Ry. Co.*, 25 Conn. at page 277, 65 Am. Dec. 571) it is said that the insurer may enforce his right of subrogation in equity or in admiralty in his own name, but that in the courts of common law the right can be enforced only in the name of the insured. In *St. Louis, etc., Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. at page 235, 11 Sup. Ct. at page 557, 35 L. Ed. 154, it was said (speaking of the right of subrogation): "By the strict rules of the common law, it must be asserted in the name of the assured; in a court of equity or admiralty, or under some State Codes it may be asserted by the insurer in his own name."

See, also, *Norwich Union Fire Ins. Co. v. Standard Oil Co.*, 59 Fed. 984, 987, 8 C. C. A. 433; *Insurance Co. v. Strong*, 18 Ohio Cir. Ct. R. 464.

Turning to the statutes of Ohio (Rev. St. 1908, § 4993), we find that "an action must be prosecuted in the name of the real party in interest," with certain exceptions not applicable here. In several cases statutes similar to that in Ohio have been expressly held to give the right of action at law in the name of the assured (*Marine Ins. Co. v. St. Louis, etc., Ry. Co.* [C. C.; Caldwell, D. J.] 41 Fed. 643, 645; *Norwich, etc., Ins. Co. v. Standard Oil Co.*, 59 Fed. 984, 987, 8 C. C. A. 433;

Swarthout v. C. & N. Ry. Co., 49 Wis. 625, 6 N. W. 314; *Connecticut Fire Ins. Co. v. Erie R. Co.*, 73 N. Y. 399, 405, 29 Am. Rep. 171), although the rule would be different when the insurer had paid a part only of the loss, for in such case the principle forbidding the splitting of an action would forbid a suit by the insurer for a part only of the loss claimed. *Norwich Ins. Co. v. Standard Oil Co.*, *supra*; *Continental Ins. Co. v. Loud*, 93 Mich. 139, 53 N. W. 394, 32 Am. St. Rep. 494. In *United States Casualty Co. v. Bagley*, [129 Mich. 70, 55 L. R. A. 616, 95 Am. St. Rep. 424, 87 N. W. 1044], *supra*, the recovery was in the name of the insurer. We find nothing in *Hall v. Railroad Co.*, 13 Wall. (U. S.) 372, 20 L. Ed. 594, or in *Memphis, etc., R. Co. v. Dow*, 120 U. S. 301, 302, 7 Sup. Ct. 482, 30 L. Ed. 595, opposed to the conclusion that under the statutes of Ohio the action for subrogation is properly maintained by the insurer who has paid the entire loss.

It is further urged against plaintiff's right of recovery that the petition does not show that judgment was actually taken against the brewing company; the implication being that the liability was settled without judgment. We see no merit in this contention. Assuming that no recovery could be had in advance of actual payment of the liability, the only effect of a judgment would be by way of evidence establishing liability. If the insurance company saw fit to pay the claimed liability without judgment, and without warning the engineering company, so as to bind it by that judgment, the burden rests upon it of establishing in this suit, by proof, not only that Leinhart's death occurred through the negligence of the engineering company, but also the extent of the damages recoverable by his relatives on account of that death.

It follows, from the views we have expressed, that the court below erred in sustaining the demurrer.

The judgment is, accordingly, reversed, with directions to take such further proceedings in the case as are not inconsistent with this opinion.

BRADY v. PUBLIC SERVICE RAILWAY CO.

[SUPREME COURT OF NEW JERSEY, MARCH 30, 1911.]

80 N. J. L. 471.

1. Highways—Public Nuisance—Obstruction.

A person who obstructs a public highway, or renders its ordinary use dangerous, creates a public nuisance, and for injuries resulting directly therefrom to travelers upon the highway he is legally answerable.

2. Highways—Obstruction—Liability.

A person who places an obstruction in a public highway cannot relieve himself from responsibilities for injuries resulting therefrom to a traveler upon the highway by showing that some other person is under a legal liability to remove it.

[Headnotes by the Court.]

Error to the Circuit Court of Essex County to review a judgment rendered in favor of plaintiff in an action brought to recover damages for personal injuries caused by collision with a wagon which had been left in the highway. Affirmed.

For plaintiff in error—Leonard J. Tynan, and Lefferts S. Hoffman.

For defendant in error—Riker & Riker.

DECLARATION.

Public Service Railway Company, a corporation of the State of New Jersey, was summoned to answer John A. Brady, of a plea of tort, and thereupon the said John A. Brady, by Riker & Riker, his attorneys, complains:

For that whereas, heretofore, to-wit, on the twenty-third day of March, A. D., nineteen hundred and six, at Caldwell, in the county of Essex aforesaid, the North Jersey Street Railway Company, a corporation of New Jersey, was then and there possessed of a certain car propelled by electricity, which said car was then and there under the care, government and direction of the then servants of the said North Jersey Street Railway Company, who were then and there propelling the same upon the tracks of the said North Jersey Street Railway Company, laid in and along a certain public and common highway,

NOTE.

On the subject of Defects or Obstructions on Highways, see notes in 4 Am. Neg. Rep. 96, 268; 5 Am. Neg. Rep.

516; 6 Am. Neg. Rep. 84; 7 Am. Neg. Rep. 239; 11 Am. Neg. Rep. 128, 232.

And on the subject of Obstructions on Sidewalks, see notes in 6 Am. Neg. Rep. 349, 356; 7 Am. Neg. Rep. 358.

known as Bloomfield Avenue in the Borough of Caldwell, aforesaid, and that one Fred Vanpell was then and there possessed of a certain wagon and two certain horses then and there drawing the same which said wagon was then and there lawfully being driven in and along the said highway at Caldwell, aforesaid; that it was the duty of the North Jersey Street Railway Company, by its servants and agents to use such care in the operation of its said car that no injury or damage would result therefrom to the wagon of Fred Vanpell aforesaid; nevertheless, the North Jersey Street Railway Company, then and there, by its servants, so carelessly and improperly propelled and governed the said car, that by and through the said carelessness, negligence and improper conduct of the said North Jersey Street Railway Company by its said servants in that behalf, the said car of the said North Jersey Street Railway Company then and there ran and struck with great force and violence upon and against the said wagon of the said Fred Vanpell, and thereupon and then and there crushed and damaged the same and killed David Welsh, the driver thereof; so that the wrecked wagon then and there blocked the tracks of the North Jersey Street Railway Company laid in and upon said highway; and also became and was an obstruction to the passage to and fro and along said highway of travelers by foot and in vehicles, so that it became the duty of the North Jersey Street Railway Company to dispose of or guard such obstruction as to make said highway safe for the passage of travelers on foot and in vehicles in passing to and fro thereon; but that the said North Jersey Street Railway Company disregarding its duty in that behalf, by its servants and agents then and there dragged the wrecked wagon aforesaid, from off its tracks and cast and laid the same in and upon the public highway aforesaid in such a manner that it obstructed the free and safe use of said highway by travelers on foot and in vehicles thereupon and did not guard the same.

And the plaintiff, on the twenty-fourth day of March, A. D., nineteen hundred and six, at Caldwell aforesaid, became lawfully possessed of a certain wagon of the value of five hundred dollars, and of a certain horse, then and there drawing such wagon, which said horse, harnessed to said wagon, the plaintiff was then and there lawfully driving over the highway aforesaid, at Caldwell, aforesaid, at night when said highway was in darkness, and by reason of the premises and because there was no light or other guard about the wrecked wagon, so as aforesaid, cast and laid upon said highway, by the said North Jersey Street Railway Company by its servants and agents, whereby the plaintiff might have discerned and avoided the same, and then and there,

without fault of his own and because of the wrongful conduct of the North Jersey Street Railway Company aforesaid, by its servants and agents, ran and struck with great force and violence upon and against the wrecked wagon aforesaid and thereby, then and there, the plaintiff was thrown out of his wagon and injured in and about his body and limbs, and became sick, sore, lame and disordered, and has so continued hitherto; and also the said wagon of the said plaintiff, then and there, was crushed and damaged, and destroyed, and the harness whereby the plaintiff's horse was harnessed to said wagon, was broken and was rendered of no use or value to the said plaintiff; and thereby the said plaintiff was compelled to expend and lay out large sums of money in endeavoring to cure himself of the injuries caused as aforesaid, and was also compelled to lay out and expend large sums of money in repairing his wagon and harness, injured and destroyed as aforesaid. And the plaintiff avers that after the twenty-fourth day of March, A. D., 1906, and before the commencement of this suit the said North Jersey Street Railway Company became and was merged with other corporations of this State, by virtue of the laws of this State, into a corporation of this State known and designated as the Public Service Railway Company, and that the Public Service Railway Company thereupon became and was and is liable to answer to the plaintiff for the carelessness, negligence and improper conduct of the North Jersey Street Railway Company, by its servants and agents as aforesaid, to the damage of the plaintiff five thousand dollars; and therefore he brings his suit.

PLEA.

Thomas N. McCarter, formerly president, a director and stockholder of North Jersey Street Railway Company, by Leonard J. Lyman, his attorney, comes and defends the force and injury, when, etc., and for plea to the said declaration says that North Jersey Street Railway Company was organized and became a body corporate on the twelfth day of June, 1894, under and by virtue of the provisions of an Act entitled "An act to authorize the formation of traction companies for the construction and operation of street railways, and to regulate the same," approved March 14, 1893, and so continued until the twentieth day of August, 1907, when an agreement of consolidation was filed in the office of the Secretary of State of New Jersey, made by the directors of the said North Jersey Street Railway Company the directors of Jersey City, Hoboken and Patterson Street Railway Company and the directors of United Street Railway Company of Central New Jersey, in pursuance of said Act of the legislature, dated the 30th day of

July, 1907, and adopted, ratified and approved by the stockholders of said companies at special meetings thereof called separate on due notice of time and place of holding the same for the purpose of taking the same into consideration and held on the 20th day of August, 1907, whereby and upon the filing of said agreement of consolidation in the office of the Secretary of State on said day of August said North Jersey Street Railway Company ceased to exist and all of its powers, liabilities and franchises thereupon terminated and that before the time of the issuing or service of summons in the above stated causes the business of said North Jersey Street Railway Company had been wound up according to law and the said company had ceased to be a corporation in fact as well as in law. And this the said Thomas N. McCarter is ready to verify; wherefore he prays judgment of the said writ and declaration and that the same may be quashed.

Argued before GUMMERE, C. J., and BERGER and VOORHEES, JJ.

GUMMERE, C. J. This was an action for personal injuries. The material facts proved in the case were as follows: The plaintiff was driving at night along Bloomfield avenue in the borough of Caldwell when he collided with a damaged swill wagon which had been left in the road, was thrown from his own vehicle, and severely hurt. The night was dark, and he did not see the wagon until the collision occurred. On the evening before the accident a trolley car of the defendant company ran into this swill wagon, demolished it, and killed the driver. The wagon rested partly upon the trolley tracks, and the employees of the defendant company pulled it off to one side and left it in the road. They put a warning light on it that night, and the next day advised its owner of the situation. After doing this they took no further steps to prevent the swill wagon from being a menace to the safety of persons traveling along the highway. Upon these facts the jury found in favor of the plaintiff.

The assignments of error challenge the action of the trial court in refusing to nonsuit the plaintiff, in refusing to direct a verdict for the defendant, and in excluding testimony offered by the defendant.

The motion to nonsuit was based upon the ground that there was no proof that the wrecking of the swill wagon was due to negligence on the part of the motorman operating the defendant's car. Counsel for the defense admit in their brief that: "The proofs justified inferences which perhaps raised a *prima facie* case of negligence;" but contend that those inferences were overthrown by the fact that the plain-

tiff called the motorman to prove the happening of the accident, and then refrained from asking him whether the collision was due to collision on his part. We cannot concede the soundness of this contention. We know of no rule of law which requires a litigant who calls his adversary, or the latter's servant, and proves by him a single fact to then proceed to examine him generally with relation to the matters in issue between parties, and the cases cited by counsel as authority for their contention (*Bahr v. Lombard Ayres & Co.*, 53 N. J. Law, 233, 16 Am. Neg. Cas. 689, 21 Atl. 167, 23 Atl. 167, and *Mitchell v. Boston & Maine R. Co.*, 68 N. H. 96, 16 Am. Neg. Cas. 242n, 34 Atl. 674), as we understand them, not only do not support it, but do not even consider it. We conclude that this assignment is without merit.

The request for the direction of a verdict in favor of the defendant was also rightly refused. The theory upon which it was rested, as we gather from the argument of counsel, was that the company had a legal right to remove the wrecked wagon from its tracks and deposit it upon another part of the highway, and that having done so it was under no legal obligation to see to it that the presence of the wreck in the place where it was deposited should not be a source of danger to other persons using the highway; and, further, that, if such an obligation did rest upon the company originally, it only continued until the owner of the wagon was notified by the company of its presence in the highway, and then was shifted to him.

If the demolition of the wagon had been the act of some one other than the company, or one of its servants, its removal from the company's tracks to some other part of the highway would not have rendered the company liable to other users of the highway for injuries resulting to them from the presence of the wagon in the place to which it had been moved. A traveler upon a highway who meets with an obstruction therein, for whose presence he is not responsible, is entitled to remove it aside, so that he may proceed upon his way; and in doing so he incurs no liability to any other traveler who may follow him on that road at a later period. *Howard v. Union R. Co.*, 25 R. I. 652, 16 Am. Neg. Rep. 240, 57 Atl. 867, 65 L. R. A. 231. But the rule is otherwise with regard to the person who creates the obstruction. Every person having occasion to use the public highways of the State is entitled to feel that he is absolutely safe, while using ordinary care, against all accidents arising from obstructions therein, and no one has a right, without special authority, to obstruct a public highway or render its ordinary use dangerous. If he does so, he thereby creates a public nuisance, and for injuries directly resulting therefrom to travelers upon the highway he is legally answerable. *Bowen v. Detroit*

City R. Co., 54 Mich. 496, 20 N. W. 559, 52 Am. Rep. 822; Harlow v. Humiston, 6 Cow. (N. Y.) 189; Temperance Hall Association v. Giles, 33 N. J. Law, 260; Driscoll v. Carlin, 50 N. J. Law, 28, 11 Atl. 482.

The suggestion that a person who places an obstruction in a public highway may relieve himself from responsibility for injuries resulting therefrom to users of the highway by notifying the owner of the chattel, which has been used to create the obstruction, of its whereabouts does not appeal to us. Assuming that the owner may become liable for failing to remove his property from the highway within a reasonable time after notification of its presence there (a matter which is not before us for consideration, and upon which we express no opinion), his neglect cannot operate to relieve the original tortfeasor from the consequences of his wrongful act. Ogston v. Aberdeen Tramways Co., L. R. App. Cas. (1897) p. 111. In other words, "one who creates a nuisance on the highway cannot shelter himself behind the claim that some one else is under a legal liability to remove it." Joyce on Nuisances, § 217.

It is further urged as a ground for reversal that the trial court erred in refusing to permit the plaintiff in error to show that the day after the wrecking of the swill wagon and its removal from the company's track the company's superintendent notified the authorities of the borough of Caldwell of the fact that the highway was obstructed by the presence of the wagon there. The proof was offered upon the theory that, when the borough became aware of the fact that one of the streets within its borders had become dangerous to travelers, it immediately became charged with the duty of putting it in a safe condition. What we have already said in disposing of the contention that the owners of the wagon, and not the plaintiff in error, is liable for the injuries received by the plaintiff makes it plain, we think, that the evidence was immaterial; the reason being that the default, if any, of the borough authorities did not affect the primary liability of the company.

Another and the last reason advanced for reversing the judgment under review is that the judge invaded the province of the jury by saying to them in his charge: "If this wagon was run into, it was run into in the rear, and that makes it, in my judgment, a *prima facie* case of negligence against the vehicle in the rear." The point of the criticism upon the charge is that whether or not the wagon was run into from the rear was a matter in dispute, which should have been left to the jury to determine. Conceding this to be the case, and that the action of the trial court cannot be justified, nevertheless it affords no ground of reversal, for no exception was taken to this instruction

by the plaintiff in error, and no assignment of error, which rests neither upon the record itself nor upon a properly sealed bill of exceptions, is entitled to consideration in a court of review.

The judgment will be affirmed.

**HART, ADM'X v. NEW YORK CENTRAL & HUDSON RIVER
RAILROAD CO.**

[COURT OF APPEALS OF NEW YORK, APRIL 30, 1912.]

205 N. Y. 317.

1. Master and Servant—Vice Principal—Engineer on Locomotive—Death of Fireman by Explosion.

An engineer operating a detached locomotive engine and in absolute control of its movements, is a vice principal within the meaning of the Railway Law, § 42a., as amended by chapter 657, Laws of 1906, which provides that in actions against a railroad corporation to recover for personal injury to any person in its employ, "it shall be held in such actions that persons * * * who are intrusted by such corporation * * * with the authority of superintendence, control, or command of other persons in the employment of such corporation * * * or with the authority to direct or control any other employee in the performance of the duty of such employee, or who have, as a part of their duty, for the time being, physical control or direction of the movement of a * * * locomotive engine * * *, are vice principals of such corporation * * * and are not fellow servants of such injured or deceased employee," and, therefore, the railroad company is liable for the death of a fireman employed on such engine caused by the explosion of the engine due to the failure of the engineer to perform his duty to keep a sufficient supply of water in the boiler.

2. Master and Servant—Death of Servant—Recovery—Misrepresentation as to Age.

The fact that one employed as a fireman upon a locomotive who was killed by the explosion of the engine due to the failure of the engineer to perform his duty to keep a sufficient supply of water in the boiler, obtained his position by falsely representing that he was over 21 years of age, does not affect the relation of master and servant with respect to the master's statutory obligation respecting the safety of persons serving it, and therefore such misrepresentation is not material in an action to recover damages for the servant's death.

Appeal by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department (146 App. Div. 885, 130 N. Y.

CASE NOTE.

**Liability of Master for Injury to Minor
Servant Who Procured Position
by False Statement as to Age.**

"The law is well settled," said the court in *Denver & R. G. R. Co. v. Reiter*, 47 Colo. 417, 107 Pac. 1100 (1910), "that though a minor, applicant for employment, untruthfully represents himself to be of age in order to secure employment, and such representation is believed by his employer, he is not

thereby barred from a recovery for injury which he may suffer by the negligence of his employer; that the effect of such representation is to place upon the employer the same duty as such employer owes to an adult. In other words, by the false representation the boy becomes entitled only to a man's protection, and the employer is relieved of the higher duty which he would owe to a minor."

In *Goff v. Norfolk & W. R. Co.*, 34 Fed. 299 (1888), it was held that a

Supp. 1114), which affirmed a judgment rendered in favor of plaintiff in an action brought to recover damages for the death of plaintiff's intestate caused by the explosion of a locomotive engine on which he was employed as fireman. Affirmed.

For appellant—A. H. Cowie.

For respondent—Harry E. Newell.

GRAY, J. The action was brought to recover damages for the death of the plaintiff's intestate, which is alleged to have been caused by negligence chargeable to the defendant. The particular negligence charged consisted in the act of the engineer, at the time in charge of an engine upon which the deceased was working as fireman, in allowing the water to become so low in the boiler as to cause an explosion.

railroad company is not chargeable with negligence in employing a minor as a brakeman upon the belief that he is of age, according to his representations and general appearance.

It was held in *Williams v. Ill. Cent. R. Co.*, 114 La. 13, 20 Am. Neg. 679 (1905), that minority was not a factor in an action for damages for personal injuries sustained by a young man about 19 years of age, who had the physique of a man and weighed about 150 pounds, and who secured a position as brakeman upon a railroad upon making a sworn statement that he was 21 years of age.

And in *Hewett v. Woman's Hospital Aid Ass'n*, 73 N. H. 556, 20 Am. Neg. Rep. 621, 7 L. R. A. (N. S.) 496 (1906), it was held that the fact that at the time one who sought employment as an apprentice nurse at a hospital represented herself to be older than she really was, did not relieve the hospital of its ordinary duty to inform her of the suspected dangerous character of a case over which she was placed in charge, and from which she contracted a contagious disease. The court said that her misrepresentation as to her age did not affect the relation of master and servant which

existed between her and the hospital.

And in *Lupher v. Atchison, T. & S. F. R. Co.*, 81 Kan. 585, 106 Pac. 284, 25 L. R. A. (N. S.) 707 (1909), the court said: "The fact that a brakeman obtained his position by falsely stating that he was of full age when he was in fact but 18 years old, a rule of the company forbidding the employment of minors in that capacity, does not relieve the company from its obligation to exercise the same care for his protection that is due to any other employee, or disentitle him to recover for an injury due to the want of such care, and not occasioned by his minority or immaturity."

And in *Matlock v. Williamsville, G. & St. L. R. Co.*, 198 Mo. 495, 115 Am. St. Rep. 481 (1906), it was held that the fact that a minor applicant for employment as a brakeman upon defendant's railroad falsely represented himself to be of age in order to obtain a position and that such representation was believed by the company, will not bar a suit by the boy's father to recover damages allowed him by statute, for the negligent killing of a minor child. The court said: "Did the misrepresentation that the

It was alleged that the engineer was the vice principal of the defendant, having the physical control and direction of the movement of the engine. The omission of the engineer was admitted upon the trial and, also, the fact that the deceased came to his death through injuries received from the explosion. It was proved to be the engineer's duty to see to the condition of the water in the boiler and that he omitted to operate the injector; a mechanical contrivance by which the water in the tender is fed to the boiler of the engine. At the time of the occurrence, the engine, upon which were the deceased and the engineer, was running on the defendant's road without any cars attached, and, being classed as a "train" under its rules, there being no conductor, the engineer was in charge. He was responsible for the safety of the train, and the fireman was under his direction.

The trial court submitted to the jurors the question of the engineer's

plaintiff's son was twenty-one years old bar the father's action? The established rule in this State is that the Act under which this suit is brought was designed to transmit a right of action which but for the section would have ceased to exist or would have died with the person; that is, when a person dies from one of the acts defined in the statute which would have entitled such person to sue had he lived, such cause of action may be maintained by certain representatives of the deceased notwithstanding the death of the party receiving the injury. The right to bring an action of this sort is founded upon the relation of parent and child and not that of master and servant. It is the right of the father in this case to recover damages which his son might have recovered had he survived the injury. The large question then involved in this proposition is, would the plaintiff's son have been barred from recovery had he survived the accident; in other words, will the fact that a minor applicant for employment untruthfully represents himself to be of age in order to secure employment and such representation is believed by his employer, bar him from recovering from any and all injuries

which his employer negligently may inflict upon him? Will the employer be heard in a court of justice to say that his negligence only injured the boy when he thought he was injuring a man? It may be conceded for the sake of argument that the boy owing to his representation that he is a man is only entitled to a man's protection and not to the higher duty which his employer would owe to a minor, but surely it cannot be said that the boy, despite his misrepresentation, is not entitled to some protection. Upon what principle can it be said that if the master on account of his negligence would be liable to his servant if he was a man, he should entirely escape all liability because his servant was only a boy, and had represented himself to be a man? If the defendant had no right negligently to kill a man, certainly it had no right to kill a boy by the same negligence because it believed him to be a man. But the contention is that if the plaintiff's son had been an adult, the statute would give no right to the plaintiff, his father, to recover, and owing to the misrepresentation, the plaintiff is estopped from asserting that his son was a minor. Bluntly stated then this contention would amount to

negligence and instructed them that, if found, it was attributable to the defendant. Exception was taken by the defendant to this instruction, and again, when repeated in a ruling, at the close of the charge, and the question of the defendant's liability for its engineer's negligent act was definitely raised. The plaintiff had a verdict, and the judgment thereupon entered has been unanimously affirmed by the Appellate Division. The defendant further appeals to this court and insists that the trial court erred in holding that it was chargeable with the engineer's carelessness. It is contended that the engineer was not in the position of a vice principal of the defendant, within the provisions of the Railroad Law. The statute, whose construction and application are involved, was enacted as an amendment of the General Railroad Law and was added thereto as section 42a. Laws 1906, c. 657. It provides that, in actions against a railroad corporation to

this: If the defendant had known that plaintiff's son was a minor it would not have employed him, because it could not then have negligently killed him without being liable over to his parent. * * * All that the misrepresentation of the deceased led defendant to do, was to employ him as a servant. It is not asserted that the boy in any way did not faithfully perform his contractual duties. No breach of his contract is involved in this case. * * * Conceding that defendant would not have employed plaintiff's son if he had not misrepresented his age, and that it acted upon his misrepresentation and employed him and put him to work as an adult, still this will not meet the contention of defendant or justify the instruction, because defendant can only assert that relying upon the minor's misrepresentation it proceeded to do some act which was lawful for it to do, not that it proceeded negligently to kill the boy, as it would have no right to kill a man servant negligently."

In *Lake Shore & M. S. R. Co. v. Baldwin*, 19 Ohio C. C., 338 (1900), it was held that a minor who obtained a position as switchman and brakeman upon a railroad in direct violation of

the rules of the company against the employment of minors, by falsely representing himself to be 21 years of age, did not thereby become a trespasser and so forfeit his right to protection as an employee. The court said: "A large number of cases have been cited where it was held that persons wrongfully upon trains were trespassers, and not entitled to the protection of the railroad company, and learned counsel for the railroad company insist with great vigor and earnestness that, under a state of facts in this case, Baldwin was a trespasser and wrongdoer; that he procured his employment in the service of the railroad company by false pretences; that he was wrongfully upon the train where he was injured; that, being a wrongdoer and trespasser, the company owed him no duty to provide a safe place for him to work and safe appliances and machinery to do his work. * * * The rule of the company requiring its employees to be 21 years of age is a reasonable one, but we cannot agree with counsel that the false statement of Glenn Baldwin as to his age made him a trespasser upon the cars and tracks of the railroad company. * * * Putting it as strongly as counsel for

recover for a personal injury to any person in its employment, "it shall be held in such actions that persons * * * who are intrusted by such corporation * * * with the authority of superintendence, control or command of other persons in the employment of such corporation * * * or with the authority to direct or control any other employee in the performance of the duty of such employee, or who have, as a part of their duty, for the time being, physical control or direction of the movement of a signal, switch, locomotive engine, car, train or telegraph office, are vice principals of such corporation * * * and are not fellow servants of such injured or deceased employee," etc. This amendment of the Railroad Law extended the liability of a railroad corporation in that class of actions and brought within the scope of a vice principal's relation every person who might be invested with authority to superintend, control, or direct other employees, or whose duty might

the company can put it, that he falsely represented his age to the company. * * we still think that, while he was in the actual service of the railroad company, he was entitled to the protection of an employee. The fact that he misrepresented his age, and the further fact that he was a minor, did not make the contract for services void, but voidable. The railroad company, having been deceived, on the other hand, could terminate it whenever it discovered the deception; but, until one party or the other put an end to the relations, the contract continued to exist."

On the other hand, in *Norfolk & W. R. Co. v. Bondurant's Adm'r*, 107 Va. 515, 15 L. R. A. (N. S.) 443, 122 Am. St. Rep. 867 (1907), it was held that a minor who obtained employment upon a railroad train with knowledge of the existence of a rule of the company which forbids the employment of infants in its train service, by falsely representing to the company that he was of age, cannot recover for personal injuries sustained in the course of his service by reason of the negligence of the company's servants, although it is admitted that his infancy in no way contributed to his injury. The court said: "It is true,

that the only relation which existed between him and the railroad company was induced by fraud. But for his fraud and misrepresentation, he could never have been upon the engine. He was, therefore, a trespasser, or at most a bare licensee, to whom the railroad company stood in no contractual relation and owed no other duty than not to injure him recklessly, wantonly or wilfully. The law is settled that it is one of the primary non-assignable duties of a corporation with a large number of employees, performing difficult and dangerous duties, to prescribe and promulgate rules for their government. In the performance of its duty, the Norfolk and Western Railway Company adopted a rule prohibiting the employment of infants under 21 years of age, without the consent of parents or guardian. It is a reasonable and salutary rule, from whatever point of view it may be considered. It shields and safeguards the infant from the consequences of his inexperience and temerity, and promotes the safety of the public by securing mature and efficient employees for the discharge of the dangerous and difficult duties pertaining to a common carrier of passengers and freight. It would be a hard

require the performance of the acts of physical control, or direction, specified. What gave rise to the passage of the Act was the sentiment that the fellow-servant rule should be limited to those cases, where the employee, whose act occasioned the injury, was not in authority, or control, and it was the legislative intent to prescribe the conditions under which corporate responsibility for personal injuries, occasioned by a fellow servant's negligent act, should attach. The acts required in the "physical control, or direction, of the movement" of a locomotive engine, or train, are details of the engineer's work; but he is made as to such details a vice principal, in view of the dangers to be guarded against in moving a locomotive engine, or train. It is argued that there is a distinction between the act of keeping an engine in a condition to be moved and the act of physically controlling, or directing, its movement. That is true enough; but in either case this engineer was in charge of the moving engine and, in his position of control, he was a vice principal, under the statute, as to all acts in the performance of his duty, which, for the time being, were necessary to the safe movement—that is to say, operation—of the engine. We had, lately, to consider the responsibility of an engineer, under this statute, in *Utess v. Erie R. R. Co.*, 204 N. Y. 324, 97 N. E. 722. In that case, it was sought to hold the defendant liable for personal injury occurring to the plaintiff, one of its employees, through the falling of a piece of coal from the locomotive tender as a train passed him. It was held that the engi-

measure of justice to hold a company responsible, on the one hand, for failure to prescribe rules, and on the other, to refuse to protect it from the consequences of the violation of reasonable and proper rules, adopted and promulgated in the discharge of the duty imposed by law."

A railroad company cannot be held liable to a father for injuries sustained by his minor son who was employed as a brakeman, merely because it failed, at the time the contract of employment was entered into, to inquire of the father as to the truthfulness of the son's declaration that he was of age, where it appeared that the son obtained employment by representing himself to be of age, which representation the company believed, and had good reason to believe from his general appear-

ance, conduct and size. *Pittsburg, C. C. & St. L. R. Co. v. McLaughlin*, 14 Ohio C. C. 286 (1897).

In *McDermott v. Iowa Falls & S. C. R. Co.*, (Iowa), 47 N. W. 1037 (1891), the court upheld an instruction that one who obtained employment as a brakeman upon a railroad by falsely representing himself to be of age, could not recover for injuries received while so employed, if his age contributed to his injuries. This case was reversed upon other grounds upon rehearing, reported in 85 Iowa, 180, 14 Am. Neg. Cas. 668n (1892).

This note does not include cases on the subject of the liability of a master for an injury sustained by an employee under the statutory age as affected by misrepresentations as to age.

neer, though a vice principal of the defendant in controlling the movement of the engine, was not "obligated by his employment, or position, to have knowledge of the condition of the coal within the tender," and therefore the statute did not apply to such a case. The "engineer," it was observed in the opinion, "did not create the dangerous condition through a negligent operation of the engine." In this case, it was proved to be the engineer's duty and practice to see to the water in the boiler, and that involved the operation of the injector by which water was supplied. It would be negligence to run the engine with insufficient water in the boiler, and therefore a neglect of the engineer to attend to that detail would be an omission of a part of the duty, with which he was intrusted, in directing the movement of his engine.

We think that the trial court committed no error, in ruling as it did upon this question.

It is further contended, on behalf of the appellant, that it was error for the trial court to exclude evidence, showing that the deceased had misrepresented his age at the time that he contracted with the defendant for his employment. The appellant proposed to show that, in the written application made by him, he falsely represented that he was over 21 years of age, and, having obtained his position by the false representation, that his rights were only those of a licensee. The trial court committed no error in excluding the evidence, as constituting no defense. The misrepresentation of the deceased affected the contract of employment, in the sense that it made it voidable; but it did not affect the relation of master and servant, with respect to the former's obligation under the statute respecting the safety of the person serving it. Notwithstanding that the deceased, by his misrepresentation, evaded the rule of the defendant forbidding the employment of minors, he was actually in its service, and therefore was entitled to the protection of an employee accorded by the law. See *L. S. & M. S. Ry. Co. v. Baldwin*, 19 Ohio Cir. Ct. R. 338; *Lupher v. Ry. Co.*, 81 Kan. 585, 106 Pac. 284, 25 L. R. A. (N. S.) 707.

For the reasons given, I advise the affirmance of the judgment appealed from.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment affirmed, with costs.

BRIESE V. MAECHTLER.

[SUPREME COURT OF WISCONSIN, APRIL 5, 1911]

146 Wis. 89.

1. Infants—Torts—Liability.

A minor is responsible for compensatory damages resulting from torts in the same manner as an adult.

2. Infants—Care Required—Negligence.

A child in playing with other children is only required to exercise that degree of care which the great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child.

3. Infants—Playing in School Yard—Negligence.

No actionable negligence on the part of defendant is shown by proof that plaintiff and defendant were boys about 10 years of age, attended the same school, were friends, and while playing in the school yard at recess the defendant accidentally ran into the plaintiff as he was kneeling to shoot his marble, knocking him over and thereby causing him to lose the sight of one of his eyes.

Appeal by plaintiff from a judgment of the Circuit Court of Ozaukee County, rendered in favor of defendant in an action brought to recover damage for negligent injuries caused by a schoolmate. Affirmed.

For appellant—William F. Schanen.

For respondent—John C. Kleist and T. H. Sanderson.

STATEMENT OF FACTS: This is an appeal from a judgment of nonsuit in an action for personal injuries caused by negligence. The facts are brief and undisputed: The plaintiff, a boy between nine and ten years old, and the defendant, a boy ten years and nine months old, attended the same public school in the city of Port Washington, and were friends. At recess on the 25th of March, 1909, both plaintiff and defendant were playing in the schoolyard; the plaintiff playing marbles with two other boys, and the defendant playing tag with some older boys. Just as plaintiff was kneeling down preparing to shoot, the defendant came running around the schoolhouse, being chased by another boy, and accidentally ran or bumped into the plaintiff, knock-

NOTE.

On the subject of the Liability of a Father for the Tort of His Infant Son, see note in 6 Am. Neg. Rep. 413.

And see *THIBODEAU V. CHEFF*, 24 Ont. L. Rep. 214 (1911), reported in this volume (1 N. C. C. A.), page 378, *ante*.

ing him over and by some mischance so injuring the right eye, either by putting his finger in it or forcing the eye against some object, that the sight was completely destroyed. There is no claim of malice or intentional wrong. The appellant's claim is that there was sufficient evidence to entitle the jury to find the defendant guilty of actionable negligence.

WINSLOW, C. J. (after stating the foregoing facts). The action is novel, if not entirely without precedent in the books. Two school-boys, one a little under and one a little over the age of ten, were playing the time-honored games of youth in the schoolyard, when by the purest accident one ran into the other and inflicted a serious injury, but an injury which no one could possibly anticipate. Under all ordinary and usual conditions, the only results would be a little shaking up of one or both of the participants, and the accumulation of a little more dust upon already dusty clothes. Had this been the case here, no one would have thought for a moment that there could be legal liability for the act, but unfortunately a permanent injury has resulted to the plaintiff, which will seriously affect his usefulness and his comfort during his whole life, and the fact that such an injury has resulted makes it important that the question of liability should be examined with care, to the end that the conclusion reached should be based on correct principles rather than upon hasty impressions.

The rule is well settled that a minor is responsible for compensatory damages resulting from his torts in the same manner as an adult. No court has laid down this rule more positively than this court in the two cases of *Huchting v. Engel*, 17 Wis. 230, 84 Am. Dec. 741, which was an action for trespass upon real estate, and *Vosburg v. Putney*, 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47, which was an action for trespass to the person, consisting of a kick during school hours. Both of these acts were unlawful acts, and in both cases the liability of an infant for compensatory damages in case of the commission of an unlawful act, even in the absence of all actual malice or evil intent, was fully sustained. See, also, *Cooley on Torts* (3d Ed.) p. 120. We have no such case here because the defendant at the time of the injury was doing a strictly lawful act. The very purpose of the schoolyard is to allow opportunity for children to play therein, and the more vigorous the exercise which they take during the brief recesses given them the better is the purpose of the schoolyard subserved. The venerable and exhilarating game of tag in its various forms must have been one of the primal games of the race, and it still occupies an honored place among the sports of childhood. Usually harmless and free from danger to participants and bystand-

ers, it seems not a sport to be discouraged or depreciated, but rather to be encouraged on account of its wholesome activity and stirring of the blood. Certainly we should not wish to do anything which would seem to make it necessary for children to stand about the schoolyard with folded hands at recess for fear they might negligently brush against one of their fellows, and become liable for heavy damages.

So it seems entirely certain that, when the accident in question occurred, the defendant was engaged in a perfectly lawful and even laudable act, and hence that the principles laid down in the two cases cited have no direct application. But this conclusion does not necessarily determine the case. Infants may be guilty of actionable negligence, and, even though the defendant was engaged in a perfectly lawful occupation, he may have conducted himself so negligently as to make himself liable for damages resulting from such negligence. Here, however, comes in the marked difference between the tests of negligence as applied to the act of an adult and the same act when committed by a child. The rule is that a child is only required to exercise that degree of care which the great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child. *Cooley on Torts* (3d Ed.) p. 823; *Anderson v. Chicago B. Co.*, 127 Wis. 273, 106 N. W. 1077; *Wade v. Chicago & N. W. R. Co.*, 146 Wis. 99, 130 N. W. 890. This was the measure of the defendant's duty, no greater and no less.

Calling back to the mind for a moment the old schoolyard at recess, its shouts, its laughter, and its confusion, the sudden dash of boys here and there, the game of marbles in one place, hopscotch in another, and crack-the-whip in another, its boys darting here and there playing tag or prison goal and intent on catching or escaping from their fellows, can any man truthfully say as he recalls the scene that the ten-year-old defendant in the present case was doing anything more or less than healthy boys of his age have done from time immemorial and will continue to do as long as the race retains its activity and love of innocent sport? It seems to us that this question can receive but one answer, and that in the negative. The injury here was serious and deplorable, but the severity of it does not affect the character of the act which caused it, so far as the question of negligence is concerned. If there may be liability for this injury, then it seems there may be liability for the multitude of trivial injuries which are accidentally inflicted by children on each other in the course of their lawful games. This would open up a new and vast field of personal injury litigation. We decline to act as pioneers in this almost limitless field. Judgment affirmed.

LANGER v. GOODE.

[SUPREME COURT OF NORTH DAKOTA, APRIL 21, 1911.]

21 N. Dak. 462.

1. Agriculture—Noxious Weeds—Destruction—Statute.

Section 2086 of the Revised Codes of 1905 construed, and held that no such duty devolves upon any person to destroy such noxious weeds as wild mustard upon the land he owns or occupies as will make him liable in damages for failure to destroy until after the county commissioners have prescribed the time and manner of destruction. As to whether an action would lie after the commissioners have acted, not determined.

2. Agriculture—Noxious Weeds—"Rights of Another."

The expression "rights of another" in the maxim set forth in section 6661 of the Revised Codes of 1905 means legal rights, and is not broad enough to include all rights determined by our moral and ethical standards.

[Headnotes by the Court.]

Appeal by plaintiff, Joseph Langer, from a judgment of the District Court of Cass County, sustaining a demurrer to a complaint in an action brought against W. H. Goode, to recover damages for defendant's alleged neglect to destroy noxious weeds growing upon his farm. Affirmed.

For appellant—J. F. Callahan, and S. B. Bartlett.

For respondent—Smith Stimmel (Pollock & Pollock, of counsel).

CASE NOTE.

Liability for Permitting Growth or Spread of Noxious Vegetation or Roots.

- I. IN GENERAL, 772.
- II. STATUTORY LIABILITY, 779.
 - A. IN GENERAL, 779.
 - B. VIOLATION BY THE PARTY DAMAGED, 781.
- III. CRIMINAL LIABILITY, 781.
- IV. INJUNCTION, 783.
- V. MEASURE OF DAMAGES, 785.

I. In General.

The mere spreading to an adjoining farm of Bermuda grass planted by a

railroad company upon its right of way to preserve its embankments, does not make the company liable for injury to the crops of an adjoining owner, in absence of proof that a person of ordinary prudence would not have planted such grass upon the right of way. *Gulf, C. & S. F. R. Co. v. Oakes*, 94 Tex. 155, 52 L. R. A. 293 (1900). The fact that this case is one of the leading authorities upon the subject of liability for the spread of noxious weeds, a quotation from the opinion may be of service. The court said: "The question to be decided is whether or not from the bare facts that appellant planted the grass upon its right of

COMPLAINT.

For his cause of action the plaintiff herein alleges and shows to the court:

(1) That at all times hereinafter mentioned the plaintiff was the owner and in possession of the certain tracts of land situated in Cass County, North Dakota, described as follows, to wit: The West half of Section Thirty-two, Township One Hundred Forty, Range Fifty-two; the West half of Section five, Township One Hundred Thirty-nine, Range Fifty-two, and the Northeast Quarter of Section Six, Township One Hundred Thirty-nine, Range Fifty-two.

(2) That at all times hereinafter mentioned the defendant was the owner and in possession of the certain tracts of land situated in Cass County, North Dakota, and described as follows, to-wit: All of Section Thirty-one, Township One Hundred Forty, Range Fifty-two; the West half and the Southeast Quarter of Section Six, Township One Hundred Thirty-nine, Range Fifty-two.

That during the year 1908 the defendant, contrary to law and to the rights of the plaintiff herein, permitted certain noxious weeds, to-

way, and that it spread to and injured adjacent farms of appellee, there results a liability for such injury on the part of the appellant. These are the only facts stated for our consideration. It is perhaps proper for the court to know judicially that this grass is much used and is valuable for pasturage, for the ornamentation of lawns, and for the preservation of embankments, and that for the latter purpose it is often employed by railroad companies in this State. In a general way, we may know, too, that, by sending out roots and runners into adjacent soil, by the washing of water and in other ways, it spreads and propagates itself rapidly in some situations and kinds of soil, more slowly in others, and that it is often difficult to prevent or arrest this process, or to cultivate other crops upon lands where it has once become seated. But further than this we cannot go in taking cognizance of any fact affecting the questions. The act for which appel-

lant is sought to be made liable is therefore the use upon its own land of a thing which is useful for some purposes, and is not shown to have been employed by it for an improper purpose. Does the owner of land who uses it for the growth of useful grass of this kind hereby become absolutely liable for damage done to another by its spreading upon his land? If so, the facts stated show a liability on the part of appellant. But if the liability is not thus absolute, but depends upon peculiar conditions existing where the grass is planted, the plaintiff seeking to establish it would have the burden of showing the facts out of which it would arise. The law, in the abstract, has been sometimes stated broadly enough to establish a liability of the kind first mentioned. * * * It is a general principle of the law that the owner of property may use it as he chooses in any lawful way; but another maxim, in general terms, requires him to so use it as not to injure

wit: Wild mustard, to grow and bear seed upon the premises owned by him and described in paragraph two of this complaint.

That said seed so grown on the premises of the defendant as hereinbefore set forth, was, during the years 1908 and 1909, blown on and across the land owned by this plaintiff and described in paragraph one herein, and polluted and rendered foul said land and the crop grown thereon during the year 1909, and caused this plaintiff labor and expense in attempting to eradicate the same and damaged the real property to this plaintiff, above described; all of which damage amounts to the sum of Fifteen Hundred (\$1,500) Dollars, no part of which has been paid, though demand has been made for the same.

Wherefore, the plaintiff demands judgment against the defendant for the sum of Fifteen Hundred (\$1,500) Dollars, together with his costs and disbursements in this action.

DEMURRER.

The defendant demurs to the plaintiff's complaint herein upon the ground that it appears upon the face of said complaint that the same does not state facts sufficient to constitute a cause of action.

another. The application of these principles gives rise to some of the most difficult questions and delicate distinctions known to the law. * * * Since the owner may use his land as he chooses, if he does not violate any law, and is not to be substantially deprived of its use or of the ordinary pursuit of his own interests, but, at the same time, is required in its use to avoid injury to another, it at once follows that he may be required to forego a particular use when it is not essential to the substantial enjoyment of his property, and is fraught with unreasonable loss to his neighbor. On the other hand, the particular use may be so important to the owner and the loss or inconvenience to his neighbor so slight compared to his, were he forbidden to so employ his property, that it would be unreasonable and unjust to impose such a restriction. In such cases, it is evident that all of the circumstances of the situation must be taken into consideration. The import-

ance of the use to the owner, as well as the extent of the damage inflicted upon his neighbor, and the rights of the parties, are to be adjusted in a practical way; the question being whether or not the proposed use is a reasonable one, under all the circumstances. * * * We are unable to discover that the law does, or from the nature of the subject, can, furnish a more definite rule. For this reason, we think it cannot be laid down as a rule of law, applicable to all circumstances and situations, that one who plants Bermuda grass upon his premises makes himself liable for any damage that may result to his neighbor, nor, on the other hand, that he may not be liable under some circumstances and conditions. As is said in some of the authorities, there must, in such inquiries where rights and interests seem to conflict, be a balancing of them. A great many cases have been adjudicated in the courts, in which such acts as throwing upon the

BURR, DISTRICT JUDGE. This is an action in which the plaintiff seeks to recover from the defendant damages alleged to have accrued to him by reason of the plaintiff's alleged neglect to destroy wild mustard growing on his farm. The complaint, omitting the formal parts, is as follows: "(1) That at all times hereinafter mentioned the plaintiff was the owner and in possession of certain tracts of land situated in the county of Cass, state of North Dakota, described as follows: [Here setting forth description.] (2) That at all times hereinafter mentioned the defendant was the owner and in possession of certain tracts of land situated in Cass county, North Dakota, and described as follows: [Here follows description of the land adjacent and contiguous to the land described in paragraph one of the complaint.] That during the year 1908 the defendant, contrary to the law and rights of the plaintiff herein, permitted certain noxious weeds, to wit, wild mustard, to grow and bear seed upon the premises owned by him and described in paragraph 2 of this complaint. That said seed so grown on the premises of the defendant as hereinbefore set forth was during the years 1908 and 1909 blown on and across the land owned by this plaintiff, and described in paragraph 1 herein, and polluted and

land or premises of another, water, stones, rubbish, filth, smoke, dust, odors, gases, noises, vibration, and the like have been held to constitute actionable nuisances. In some of these cases the act amounted to a direct invasion of another's possession of his land, and a violation of his absolute right; while in others, one in the prosecution of his business, useful and lawful in itself, interfered with his neighbor's use and enjoyment of his property. But in the latter class of cases all of the facts and circumstances of the situation were developed and considered, and the conclusion established that there was an unnecessary and unreasonable interference by one with the other. The cases in which trees belonging to one overhang their branches or penetrate with their roots the soil of another, inflicting special damage, have been adjudged to be nuisances, at first sight, appear to be analogous to this. But they are distinguishable by the fact that a tree

and all its roots and branches belong to the owner of the soil on which the trunk stands, and, when its roots and branches extend upon the land of another, there is a direct invasion by the owner of the tree of the possession of such land, and a use of it to maintain his property, which is a violation of the absolute right of the adjacent owner to the exclusive possession and use of it. Grass, when it spreads upon and takes root in the adjacent soil, becomes the property of the owner thereof, and he may do with it as he will, and hence there is no direct violation of his absolute right to the sole use and possession of his property. The question of liability, therefore, depends on the character of the act of introducing the grass, as before indicated. * * * While the ground of liability, if one can be shown, would be negligence or other culpable conduct on the part of appellant, nothing of the sort could be imputed to it if what it did was, under the principles

rendered foul said land and the crop grown thereon during the year 1909, and caused this plaintiff labor and expense in attempting to eradicate the same, and damaged the real property of this plaintiff, above described, all of which damage amounts to the sum of \$1,500, no part of which has been paid, and no demand has been made for the same. Wherefore, the plaintiff demands judgment," etc. To this complaint the defendant demurred upon the ground "that it appears upon the face of said complaint that the same does not state facts sufficient to constitute a cause of action." The proposition involved being argued before the trial court, said court sustained the demurrer, and from the order sustaining said demurrer the plaintiff has appealed to this court.

The respondent in his brief raises the question as to how the plaintiff could know, "how can anybody know," that the wind blew the mustard seed from the defendant's land upon plaintiff's land, citing authority to the effect that "the wind bloweth where it listeth, and thou canst hear the sound thereof, but canst not tell whence it cometh or whither it goeth." This objection, however, would more properly be addressed to the character of evidence which may be introduced in

stated, only a legitimate use of its property, and the facts stated fail to show that it was not such a use."

It has been held to be a question for the jury as to the negligence of a farmer in failing to cut down thistles which sprang upon land which was previously forest land, but which he had cleared, and thereby prevent the thistles from seeding and the seeds from being blown upon the land of an adjoining owner, where they took root and did much damage. The jury found that the defendant was negligent and judgment was entered in favor of the plaintiff; but, on appeal, the judgment was set aside. Coleridge, Ch. J., said: "I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles which are the natural growth of the soil. The appeal must be allowed." *Giles v. Walker*, L. R. 24 Q. B. Div. 656, 62 Law T. (N. S.) 933, 54 J. P. 599 (1890).

In *Harndon v. Stultz*, 124 Iowa.

734 (1904), the court affirmed the dismissal of plaintiff's petition in an action to recover damages for injury to his land on account of the defectiveness of the prayer for relief. As a basis for the recovery of such damages, the plaintiff alleged that during the period complained of cockleburrs and other noxious weeds were permitted by defendant to grow in large quantities upon his land in close proximity to the division line between their farms; that by the action of the wind and a natural water course extending from defendant's land over and upon that of plaintiff's, weeds and seeds were carried upon and distributed over plaintiff's land, thereby greatly damaging the same. In alleging his damages, plaintiff simply stated that it will cost him \$100 to free his land of such noxious plants and weeds. "Should we concede that the alleged tortious matter," said the court, "is such as a recovery predicated thereon might be had in any event, it is plain that none

proof of damage, if such a cause of action be maintainable, but is not properly before us on the demurrer, nor should we concern ourselves with the proposition, for, as the same authority has said, "sufficient unto the day is the evil thereof." The question presented to us on the demurrer involves the construction of sections 2086, 2087, 2088, and 2089 of the Revised Codes of 1905. The appellant in this case stands squarely for the rights which he claims he has under these sections, alleging that the defendant is guilty of a breach of duty imposed upon him by the statute, and that because of said breach appellant has been damaged, invoking the rule in the law of torts that, where a duty is imposed upon a person by a statute which is designed primarily for the protection of other people, he is liable in damages to any person for whose protection this duty is imposed resulting from neglect to perform any duty where the damages sought to be recovered are of the character which the statute is designed to prevent.

It will be noticed that the complaint in this case does not allege that the board of county commissioners for the county of Cass at any time during the years covered by the complaint prescribed the time

can be awarded plaintiff in this action, in view of his pleadings. He does not ask for damages to his land; his prayer is that he may recover the amount of expenses which he will be called upon to pay out in removing the objectionable matter. Until an expense has been actually incurred, and the amount thereof definitely ascertained, there is no authority for bringing an action to recover the same."

An action was brought in *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621 (1850), by a reversioner against the life tenant of an estate for waste consisting in permitting pastures to be overgrown with brush. The court held that if the allegations were sustained, the estate would be forfeited and damages assessed for the place so wasted over and above the value of the estate.

Grandona v. Lovdal, 78 Cal. 611, 21 Pac. 366 (1889), was an action brought for damages for injuries to land, caused

by the roots of a line of cottonwood trees standing about eight feet apart and extending for a distance of about 534 feet along the south boundary of plaintiff's farm. It was claimed by plaintiff that the roots of the trees extended into his land to a space of about sixty feet wide along the line, thereby preventing him from plowing the land and causing the same to be unproductive. There was a sharp conflict in the evidence on the question of injury to the land and the court found that plaintiff's proofs were not sufficient to warrant a verdict in his favor, and that the trees did not constitute a nuisance under section 731 of the California Code of Civil Procedure, which defines an actual nuisance to be "Any thing that is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." On a former hearing of this case, reported in

and manner of destroying noxious weeds as provided for by section 2086, and it is expressly admitted by the appellant himself in his brief that the said board did not give the required notice. It is argued by the appellant that the defendant herein owed a duty to the plaintiff, irrespective of any action of the board of county commissioners, and that, independent of the fact that the board may have failed to perform the duty imposed by the statute upon the defendant, the defendant had no right to permit a use of his property in such a way that would injure appellant. It is argued by the appellant that the act of the defendant was unlawful—that is, that it was unlawful for the defendant to omit to destroy the noxious weeds—and he cites, as ground for maintaining his action, section 6556 of the Code, which says: "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages." It becomes necessary for us, therefore, to determine whether or not under the facts in this case such a duty as hereinbefore referred to did devolve upon the defendant for the benefit of the appellant. At the outset it will be noticed that there is a difference between omitting to do some-

70 Cal. 161, 11 Pac. 623 (1886), the court held the complaint to be ambiguous and uncertain, and said: "He may have abated the roots projecting into his soil at least if he has suffered actual damage thereby."

The owner of a well of water located about three feet from the boundary line, is entitled to recover damages by reason of the pollution of the well by underground roots from mulberry trees growing on a neighbor's land about 20 feet from the boundary line. In the course of the opinion the court said: "We are not able to draw distinction between the roots of a tree which extend into a neighbor's land and overhanging branches. Undoubtedly, if the branches of a noxious tree extend over the land of another and do injury, the owner of the tree may be held responsible for the damage done. * * * It seems to be settled law that overhanging branches are a nuisance, and it must follow that invading roots are. The person intruded on

by branches may cut them off; it must be true that one may cut off invading roots; it must be true that he who is injured by encroaching roots from his neighbor's trees can recover the damages sustained from them. The right of action seems clear. * * * It is an admitted fact in this case that the roots of the mulberry trees destroyed the well. That proves the noxious character of the trees. The trees were planted by a former owner, but the appellee has no right to maintain and continue a nuisance after notice of its character and the injury done by it. True, he has as much right to shade and ornamental trees as his neighbor has to his well of unpolluted water; but if in the enjoyment of his right he invades his neighbor's, he is answerable for it. The trees and their roots are his; he must so restrain his roots as not to work injury to his neighbor; he can enjoy the full advantage of his trees, as we suppose, without permitting them to damage his neighbor;

thing which is required to be done by the statute, and the doing of something which is prohibited by the statute. It is not contended that, where a person fails to destroy noxious weeds upon any land which he owned or occupied, there is a penalty prescribed by statute for such a failure, so as to make the failure a criminal offense. Section 8760 of the Revised Codes makes it a crime to do any act, the performance of which is prohibited by statute in cases where no penalty for the violation of the statute is imposed under any statute, but this section cannot be construed so as to make it a criminal offense to fail to do an act which may be required by statute.

Section 6661 says: "One must so use his own rights as not to infringe upon the rights of another." That is but one of the many translations of the old maxim, "*Sic utere tuo ut alienum non laedas.*" These maxims are merely aids to the construction, and, as Judge Engerud pointed out in *Carroll v. Township of Rye*, 13 N. D. 458-462, 101 N. W. 894, the damages recoverable under such maxim are not damages as for every injury, but such damages only for which the law gives redress; and, as counsel in *Jeffries v. Williams*, 5 Exch. 792-797, suggests, the injury guarded against is the injury to the

he is not required to destroy them, but only to prevent them from encroaching injuriously upon others. This he is required to do upon the principle embodied in the fundamental maxim, 'So use your own as not to hurt another.' " *Buckingham v. Elliott*, 62 Miss. 296, 52 Am. Rep. 188 (1884).

II. Statutory Liability.

A. In General.

In the absence of statute (Acts 27th Leg., Texas, Chap. 117, p. 283), a railroad company is not liable for permitting Johnson grass or other noxious vegetation to grow upon its right of way, from which the seed is spread by the wind, water flowing in its natural course or other natural causes. *Bangle v. Missouri, K. & T. R. Co.*, (Tex. Civ. App.), 140 S. W. 374 (1911). In reaching this decision the court relied upon the case of *Gulf, C. & S. F. R. Co. v. Oakes*, 94 Tex. 155.

Prior to the enactment of this stat-

ute the owner of land contiguous to the right of way of a railroad company could not recover damages without showing negligence on the part of the company. *St. Louis S. W. R. Co. v. Terhune*, (Tex. Civ. App.), 81 S. W. 74 (1904).

But since the enactment of the above statute, the right of the owner of land adjoining the right of way of a railroad company to recover a penalty imposed by such statute upon railroad companies for allowing Johnson grass or Russian thistles to mature or go to seed upon their rights of way, does not depend upon the question of negligence on the part of the companies. *International & G. N. R. Co. v. Shelton*, (Tex. Civ. App.), 81 S. W. 794 (1904); *Gulf, C. & S. F. R. Co. v. Henderson & Tompkins*, 38 Tex. Civ. App. 419 (1905); *San Antonio & A. P. R. Co. v. Burns*, 39 Tex. Civ. App. 32 (1905).

In *International & G. N. R. Co. v. Doeppenschmidt*, (Tex. Civ. App.), 120

rights of others, which means legal rights, otherwise, the more complicated civilization becomes, the more difficult it would be for a man to use or enjoy the use of his own property. The English courts appear to have carried the application of this maxim for the benefit of "others" to a much greater length than the American courts, and, in fact, all or almost all of our American writers agree that the English ruling cases such as *Fletcher v. Rylands*, 1 English Ruling Cases, 235, [L. R., 1 Exch. 263, 265; a. c. L. R., 3 H. L. 330, 9 Am. Neg. Rep. 175n], have not been adopted as authority in our courts. The duty which a man owes to his neighbor in respect to his neighbor's legal rights widens in accordance with the beliefs and the age of the application of the rule. As we advance in civilization, and the principles of Christianity become more widespread—for this maxim is but an application of Christian principles—the duty which one man owes to another no doubt will enlarge and increase, and with this enlargement our legal system must keep pace, yet it must be conceded that almost invariably the highest, most delicate, and finest developed sense of duty and the best system of ethics have not been translated into the law of the land, and it is principally by change in legisla-

S. W. 928 (1909), it was held that the owner of land contiguous to a railroad right of way may recover damages to his land caused by a violation of Texas Laws 1901, chap. 117, p. 283, which prohibits a railroad company from allowing Johnson grass to mature on its right of way, without making proof that the grass which the company permitted to go to seed was on the part of its right of way contiguous to the land injured, but the company is liable on mere proof that the land was located contiguous to the right of way and that such land became infested with seed communicated from the grass growing upon the right of way, and that the plaintiff did not permit such grass to mature upon his own land.

In an action against a railroad company to recover penalties and damages under the above statute, it is not necessary for the plaintiff to allege or prove negligence on the part of the company. The court said: "The stat-

ute makes it unlawful for a railroad company to permit Johnson grass to mature and go to seed upon its right of way, and it was not error for the trial court to assume that its act in this respect was negligence." *Missouri, K. & T. R. Co. v. Tolbert*, (Tex. Civ. App.), 134 S. W. 280 (1911).

At common law a railroad company owes no duty to the owner of land adjoining its railway with respect to Johnson grass growing thereon, except to refrain from actually conveying the noxious seed to adjoining property. The court said: "Of course, if the company had wrongfully diverted surface water upon plaintiffs' land to their injury, it would have been liable for the proximate consequences, and it may be that one of the elements of the damage would in such case have been the injury resulting from the transfer of the noxious seeds by that means." *San Antonio & A. P. R. Co. v. Burns*, 39 Tex. Civ. App. 32 (1905). See, also, *Gulf, C. & S. F. R. Co. v.*

tion that the wornout legal ethics must be supplanted by the system that best expresses the moral genius of our civilization.

How far, then, does the statute go in prescribing a duty to destroy noxious weeds and permitting recovery of damages for failure so to do? The appellant concedes that no such liability was incurred at common law, and relies, as he says, "upon the plain letter of the statute," which must be construed, of course, in the light of the maxim hereinbefore quoted. It is not claimed that the action of the defendant in permitting noxious weeds to grow amounts to a public nuisance, as defined in §§ 9027 and 9029 of the Revised Codes of 1905. In *Fisher v. Clark*, 41 Barb. (N. Y.) 329, the court says: "The right of every one to use his own property as he pleases for all the purposes to which such property is usually applied is unlimited and unqualified up to the point where the use becomes a nuisance." In this case cited the court states the facts as follows: "The parties were farmers, occupying adjoining farms. Each had a flock of sheep. Those of the defendant had a contagious disease known as the scab, and the fact of the disease and the character were well known to the defendant. The defendant sent word to the plaintiff that he intended to turn this flock of diseased sheep in his own field next to that of the plaintiff, where the sheep of the plaintiff were pasturing. The plaintiff thereupon called on him and told him he must not do it, insisting that he had no right so to do, and the result of the inter-

Stokes, (Tex. Civ. App.), 91 S. W. 328 (1905).

B. Violation by Party Damaged.

An owner of land located contiguous to the right of way to a railroad company, who allows Johnson grass to go to seed upon his own land will not be permitted to recover the penalty prescribed by the Johnson Grass Act, which forbids a railroad company from allowing Johnson grass to go to seed upon its right of way. But such owner is not precluded from recovering the statutory penalty in those years in which the company does, and he does not, permit such grass to go to seed. *International & G. N. R. Co. v. Voss*, 49 Tex. Civ. App. 566. (1908). See, also, *San Antonio & A. P. R. Co. v. Burns*, 99 Tex. 154 (1905); *Missouri*,

K. & T. R. Co. v. Tolbert, (Tex. Civ. App.), 134 S. W. 280 (1911).

An owner of land used for the growing of crops cannot be said to be guilty of negligence contributing to the injury to his land which a railroad company caused by permitting Johnson grass to spread from its right of way to the land of such owner, in violation of statute, merely because he continued in a proper manner to cultivate the land after it had become infested with such grass. *International & G. N. R. Co. v. Doeppenschmidt*, (Tex. Civ. App.), 120 S. W. 928 (1909).

III. Criminal Liability.

An affidavit which charges that defendant did "knowingly and unlawfully allow Canada thistles to grow and to mature, and to become of length

view was that the defendant promised the plaintiff that he would not turn the said deceased sheep into the lot next to the plaintiff's. Disregarding this agreement, and without notice or the knowledge of the plaintiff, the defendant did turn his sheep into a lot adjoining where the plaintiff's sheep were, and only separated by a rail fence. The division fence belonged to the plaintiff to repair, and was a good fence. The sheep of the defendant got in plaintiff's field and mingled with his sheep, no evidence to show how or by whose fault. They were in several times. Once the plaintiff found a rail shoved aside where they might have passed, but he had no knowledge that they did. The other times it does not appear that there was any defect in the fence, or how they got in. The defendant had also had, with his flock of diseased sheep, some lambs so small that an ordinary or common rail fence would not stop, and they were frequently in the plaintiff's field with his sheep. That the disease was a contagious one which would be communicated either by the mingling of the sheep or by running side by side separated only by a common rail fence appeared fully by the evidence. The plaintiff's sheep became diseased and largely damaged." The defendant set up in his answer that the plaintiff was guilty of contributory negligence in not keeping his fence in repair. The court, however, determined the case entirely upon the broad principle "that every man has absolute right to use his own property as he pleases, for all

of more than 6 inches upon his land," states a criminal offense under Acts (Ind.) 1905 pp. 584, 738, sec. 627, sec. 2308 Burns 1905, regardless of the giving of notice as prescribed in section 627a, of such Act. *State v. Dawson*, 38 Ind. App. 483 (1906).

On the prosecution of a railroad company for its negligent failure to dig up and destroy Canada thistles growing upon its right of way and other lands, it is proper to instruct the jury as follows: "The jury is instructed as a matter of law, that the fact that a stray Canada thistle, growing here and there upon the right of way or other lands of a railroad company, owning, controlling or operating a railroad in the State of Illinois, has been overlooked and permitted to mature its seed, is not itself a violation of

the provisions," of sec. 41 of the Criminal Code, which provides, in substance, that a railroad company shall be subject to a fine if it shall refuse or neglect to dig up and destroy, or take other means of exterminating Canada thistles and other noxious weeds that may at any time be growing upon its right of way or other lands. The court said that if "the defendant in good faith made an honest attempt to fully comply with the requirement of the statute, and was not guilty of negligence in performing the required statutory duty, then he should not be subjected to a penalty. The gist of this action was criminal negligence in not digging up and destroying or taking other means of exterminating Canada thistles." *Chicago, M. & St. P. R. Co. v. People*,

purposes to which such property is usually applied," and disregarded entirely the question of contributory negligence of the plaintiff, and also the promise of the defendant not to put the sheep in the lot. At the present day it may well be doubted whether a court would disregard the promise which the defendant made the plaintiff in this case, independent of the fact that we have our statutes with reference to contagious diseases in animals. But in the case cited there was no claim that the plaintiff was entitled to recover under the provisions of any statute. He was trying to recover under the general doctrine of the duty which one man owed to another.

In *Giles v. Walker*, 24 Q. B. Div. 656: "The defendant, a farmer occupied land which had originally been forest land, but which had some time prior to 1883, when the defendant's occupation of it commenced, been brought into cultivation by the then occupant. The forest land prior to cultivation did not bear thistles; but immediately upon it being cultivated thistles sprang up all over it. The defendant neglected to mow the thistles periodically so as to prevent them from seeding, and in the years 1887 and 1888 there were thousands of thistles on his land in full seed. The consequence was that the thistle seeds were blown by the wind in large quantities onto the adjoining farm of the plaintiff, where they took root and did damage." The plaintiff claimed that the defendant was negligent in his duty toward him, and sought to recover damages for failure to pre-

132 Ill. App. 531 (1907).

A nonresident landowner cannot be held criminally liable because a stray thistle here and there growing upon his land was overlooked when he cut the crop and was thereby permitted to go to seed, when he had, in good faith, done all that could be reasonably expected of him to prevent maturity. *Story v. People*, 79 Ill. App. 562 (1898).

IV. Injunction.

In an action in which the evidence was conflicting as to the character and effect of Johnson grass and left uncertain the result of its introduction into agriculture, an injunction was held to have been properly denied, upon the application of an adjoining landowner, who claimed that it was a

most pernicious seed and would overrun his lands, thereby rendering them unfit and unsuitable for the production of crops, and that it was a nuisance. *McCutchen v. Blanton*, 59 Miss. 116 (1881). The court said: "If future developments shall place it beyond doubt that the grass is an evil to be prevented and extirpated, a remedy may perhaps be found. As at present advised, we regard the result of sowing the grass seed too doubtful, uncertain, and contingent to justify the continuance of the injunction. The history and habits of the grass are too little known and established to authorize its condemnation as a nuisance, which is necessary to sustain this bill. The grass may be neither an unmixed evil nor good. Time and trial will disclose its true character.

vent these thistles from going to seed. Lord Chief Justice Coleridge says: "I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles which are the natural growth of the soil. The defendant's appeal from the judgment rendered against him is allowed." Appellant cites *State v. Dawson*, 38 Ind. App. 483, 78 N. E. 352. Here the defendant was prosecuted for violating the following statute: "Any person who shall knowingly allow Canada thistle or thistles to grow and mature or shall allow Canada thistle or thistles to grow until they or any of them become of the length of six inches, measured from the surface of the soil to the end of the top of the stem above the surface of the ground, upon his, her or their land, or upon any land that they may occupy or have under their charge and control * * * shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined." It will be noticed that there is a vast difference between this statute of Indiana and the statute upon which the appellant relies. The Indiana statute makes it a criminal offense to permit the growth of the Canada thistle in violation of the provision of the statute, and prescribes penalty therefor, but the duty claimed by the appellant under our statute is not such for the violation of which any penalty has been attached, nor does the statute in any way make it a misdemeanor. It is true that section 5366 of our Code says: "That is not lawful which is, first, contrary to the express provi-

If it be said that it will be too late, after its introduction into the country, to stay the evil, if it shall prove to be such, the reply is that it is already in many places in Mississippi and Arkansas, and is in Washington county, and, if its character is correctly portrayed by some of the witnesses, it must soon have the exclusive occupancy of the whole land, and the dissolution of this injunction will exert little influence on this inevitable result."

In absence of proof that the growing of noxious weeds upon a neighboring farm was without lawful right or that a nuisance was created thereby, an injunction will not be granted at the request of an adjoining landowner, "restraining the continuance of the cocklebur seed and weeds blown and

drifted upon his land." *Harndon v. Stultz*, 124 Iowa, 734 (1904).

But the right to an injunction was sustained in *Brock v. Connecticut & P. R. R. Co.*, 35 Vt. 373 (1862), restraining a railroad company from planting willow trees for use as a fence along its track which extended through plaintiff's meadow land, on the ground that such trees by growing and spreading their roots into, and their branches over the meadow land, it would cause serious injury thereto, and because no necessity for the construction of a fence of this character was shown. It was the expectation of the company that the trees in question would grow and at some future time would be used as posts for fence boards, which, in the judgment of the officers of the company would be more

sion of law," etc. Is the failure of the defendant to destroy the wild mustard as charged in the complaint an unlawful act? Section 2086 says: "Each person shall destroy upon all lands which he shall own or occupy all weeds of the kind known as * * * mustard * * * at such time and in such manner as shall effectually prevent their bearing seed." Upon whom rests the responsibility of prescribing the time and manner of such destruction? Subsequently, in the same section, the statute says: "The time and manner of destroying such weeds shall be prescribed by the board of county commissioners," etc. Is this duty placed upon the county commissioners the foundation for the action of the road supervisor only, as prescribed in § 2088, or is it the general provision which must be complied with before liability attaches to any one in any way affected by the requirements of this statute? It would appear from a correct reading of § 2088 this section contemplates that the board of county commissioners shall fix the time and the manner of destruction for every one who has the duty of destroying weeds, and, where the owner or occupier of the land fails to destroy within the time and according to the manner prescribed, then the duty of the road supervisor begins. In other words, while the law requires each person to destroy upon all lands which he shall own or occupy all wild mustard at such time and in such manner as shall effectually prevent the bearing of seed, it does not contemplate that the man shall be a law unto himself, but

serviceable and economical than a fence constructed in any other manner, and would prevent washouts by heavy rains. The court said: "The defendant's surveyed their road across the orator's land, under and by virtue of their charter. Whether they obtained it of him by proceeding *in invitum*, whether a part was transferred by them by deed, seemed to be immaterial so far as this question is concerned. They obtained it for the purpose of constructing and operating a railroad. By their charter the company were bound to fence their road, and it was in view of this obligation that the price to be paid was fixed upon by the commissioners or the parties, but evidently neither party contemplated that the road was to be fenced in this unusual and extraordi-

nary manner, in a way that should virtually destroy or render nearly worthless an amount of land along the sides of the road nearly, if not quite, equal to the amount taken, and that, too, by the introduction into the farm of the willow trees, which some of the witnesses represent as the common enemy of the farmer in that vicinity, and one with which they have been contending half their lives, and a tree that most of the witnesses seem to consider as injurious to the surrounding land, to an extent beyond that of most other trees."

V. Measure of Damages.

The measure of damages caused by a railroad company permitting Johnson grass to go to seed upon its right of way, which was then washed onto

places upon the county commissioners the duty of prescribing the time and the manner of destruction, in order to have a uniformity in time and method, prescribed by those who presumably would be removed from any selfish desire to save time and money and labor. Therefore no duty devolves upon any one to destroy these noxious weeds until the board of county commissioners prescribes the time and manner of destruction. It being conceded that such action was never taken by the board, then no duty devolved upon the defendant, and in such a case his failure to destroy the weeds would not be an unlawful act or omission according to the definition of "unlawful" set forth in section 5366.

Counsel for the appellant urges with great force and earnestness that on account of the peculiar conditions in this State, "where the general sources of wealth are the crops that are yearly gleaned from the soil, and where the frugal and careful husbandman is the greatest asset to a community," and, further, that it is not difficult to understand why the Legislature should enact a law for the purpose of prohibiting the individual from damaging his neighbor's crops or lands as a result of his own indolence or negligence, or that they should say to him in substance, "You shall so farm your land as not to injure the crops or land of your neighbor, and, if you do so injure them, you shall answer in damages." This would have force if such were the purpose of the Legislature, but is such failure, as alleged, negligence? There is no negligence where there is no violation of a legal duty, and where there is no duty the "other" has no such right as is contemplated by the maxim quoted. To give to this statute the

the land of another by reason of the obstruction of the flow of surface water due to the improper construction of the railroad, is the depreciation in the market value of the land by reason of the grass growing thereon as the result of the act of the company. *Missouri, K. & T. R. Co. v. Malone*, (Tex. Civ. App.), 126 S. W. 936 (1910).

The measure of damage for the breach of a covenant by a tenant to leave the demised premises in as good condition as when he received them and to keep them free from cockleburrs, is the difference in the rental value of the premises in the condition contemplated by the lease, and as surrendered, for such time as, by reason-

able methods, the agreed condition can be restored, including the cost of additional labor and the expenses required in removing the noxious growths, where the premises are intended for rent and not for sale. *Brown Land Co. v. Lehman*, 134 Iowa, 712, 12 L. R. A. (N. S.) 88 (1907).

In determining the extent of the injury to the owner of a well which was invaded and polluted by underground roots from mulberry trees located on a neighbor's land, about 23 feet from the well, it is proper to consider the means of protection in the party's own hands against the injury complained of. *Buckingham v. Elliott*, 62 Miss. 296, 52 Am. Rep. 188 (1884).

interpretation which the appellant claims, would open a vast field of litigation, destroy the peace and harmony of communities, and "set every man's hand against his neighbor." The construction that will best promote the general welfare is to be preferred. *Stern v. Fargo*, 18 N. D. 289, 301, 122 N. W. 403, 26 L. R. A. (N. S.) 665. If the Legislature intended to make one liable in such a case as this, it would have been an easy matter to express such an intention in plain, unequivocal language. There is a vast difference between injuries which result in cases where a man brings upon his own land great quantities of anything which, if it escaped from his land, would injure his neighbor, and a case where, under the law or nature, noxious weeds grow upon a man's land in spite of his wish, desire and effort. So far as we can ascertain, this question has not been raised in our courts, and apparently the idea that a man is not liable under the state of facts in this case has been acquiesced in generally. It is true that the mere acquiescence in such an idea and the mere assumption on the part of either the bench or the bar, or the public in general, that a statute has a certain meaning, does not make it the law, but as is said in *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 110, 16 L. R. A. 281, 31 Am. St. Rep. 626: "A construction which has for a third of a century been accepted by every one as so obviously correct as never to have been questioned or doubted is much more likely to be right than a newly discovered one suggested at this late day by the emergencies of present litigation." Where the public in general has taken for granted that a certain construction of the law is the law, and where a change in construction as contemplated would be fraught with grave consequences, this court would hesitate to place a new construction upon the law, unless it was clear that the construction desired is the only logical one which the law will bear. But, independent of this, it is clear to our mind that there is no duty resting upon the owner or occupier of the land until the proper authorities have prescribed the time and manner of destruction.

The question as to whether a man would be liable in damages for failure to perform a duty even in case where the board of county commissioners prescribed the time and manner of destruction as required by law is not before us now, and need not be considered here.

For the reasons before given, we believe that the demurrer was properly sustained, and the judgment of the lower court is therefore affirmed.

Hon. A. G. BURR, Judge of the Ninth Judicial District, sitting at the request of the court.

SOUTHERN TURPENTINE CO. v. DOUGLASS.

[SUPREME COURT OF FLORIDA, JANUARY 28, 1911.]

61 Fla. 424.

1. Master and Servant—Assumption of Risk—Injury—Liability.

The doctrine of assumption of risk is distinct from that of contributory negligence, and rests upon an implied or express agreement, from the circumstances of the employment, that the master shall not be liable for any injury incident to the service resulting from a known or obvious danger arising in the performance of the service.

2. Master and Servant—Assumption of Risk—Action—Defense.

Assumption of risk may be made available as a defense in actions for damages by a servant for injuries received in the course of his employment; but it is an affirmative defense, and should be specially pleaded and proven by the defendant.

3. Master and Servant—Assumption of Risk—Safe Place to Work—Known Danger.

A servant does not assume the risk of accident and injury due to the failure of the master to exercise reasonable care in furnishing him with a reasonably safe place to do his work; but he does assume all risks which are necessarily incident to his employment, or which are obvious or known to him.

4. Master and Servant—Assumption of Risk—Injuries.

Subject to the rule that he does not assume risks created by reason of the master's negligence, a servant cannot recover for injuries resulting from defective or dangerous machinery or appliances, where the risks are incident to the employment, or are known, or ought to be known, by him.

5. Master and Servant—Assumption of Risk—Equal Knowledge as to Dangers.

Where the master and servant are possessed of equal knowledge of defects in machinery used and dangers incident to its use, the servant assumes the risk, where he is normally competent to act for himself.

6. Pleading—Striking Out.

To authorize the striking out of a plea on motion, it must not only be informal and bad, but it must be wholly irrelevant.

7. Appeal—Reversal.

Where a plea has been erroneously stricken out, a reversal of the judgment may follow, unless it clearly appears that no harm has resulted therefrom to the party complaining of it.

NOTE.

On the subject of Assumption of Risk, see notes in 5 Am. Neg. Rep. 22, 120; 7 Am. Neg. Rep. 72, 97, 588; 8 Am. Neg. Rep. 71, 90, 183, 638; 9 Am.

Neg. Rep. 196, 280, 306, 467; 10 Am. Neg. Rep. 212; 11 Am. Neg. Rep. 92. And on the subject of the Duty of a Master to Furnish a Safe Place to Work, see notes in 12 Am. Neg. Rep. 251; 18 Am. Neg. Rep. 608.

8. Appeal—Striking out Plea—Exception.

A motion to strike a plea relates only to matter in the record proper, and no exception to the ruling thereon is necessary.

9. Pleading—Insufficiency—Remedy.

A plea insufficient in substance may be disposed of by demurrer. A plea defective in form may be reached by proper motion under the statute.

10. Appeal—Striking Out Special Plea—No Error.

Where facts averred in a special plea may as a matter of right be shown under other pleas in the case, harm may not result from striking the special plea.

[Headnotes by the Court.]

In error to the Circuit Court of Bradford County to review a judgment rendered in favor of plaintiff in an action brought to recover damages for the death of plaintiff's husband caused by the explosion of a retort. Reversed.

For plaintiff in error—J. E. Futch, and A. V. Long.

For defendant in error—W. W. Hampton, and D. E. Knight.

WHITFIELD, C. J. Marco Douglass recovered a judgment for the death of her husband, Willie Douglass, caused by the explosion of a retort in the turpentine distillery plant of the plaintiff in error, and writ of error was taken. Sections 3145 and 3146, General Statutes of 1906 provide for such an action.

The negligence of the defendant as alleged is that "by reason of the defective retort or vat, which had upon it a broken or cracked top or cap, and on account of the lack of sufficient bolts to hold the same in place to withstand an undue amount of pressure of steam, and on account of an overpressure of steam, all of which defects and undue pressure of steam were without the knowledge of the said Willie Douglass, the cap or top of the said vat or retort was exploded and blown off, and the said Willie Douglass was fatally burned, scalded by the hot steam and liquid escaping from said retort," from the effect of which Willie Douglass died.

Among the pleas filed were a plea of not guilty and the following: "And for a fifth plea unto the said declaration, the defendant says that the decedent, the said Willie Douglass, had been in its service for a long time immediately prior to his death, and that he was well acquainted with the character and nature of the work required of him and with the danger and risk incident thereto, which said danger and risk were as patent and obvious to him as to this defendant." A motion was granted to strike the fifth plea, because it amounted to

the general issue, and because it was so framed as to prejudice, embarrass, and delay a fair trial of the cause. Error is assigned on this ruling

The doctrine of assumption of risk is distinct from that of contributory negligence, and rests upon an implied or express agreement, from the circumstances of the employment, that the master shall not be liable for any injury incident to the service resulting from a known or obvious danger arising in the performance of the service.

Assumption of risk may be made available as a defense in actions for damages by a servant for injuries received in the course of his employment; but it is an affirmative defense, and should be specially pleaded and proven by the defendant. A servant does not assume the risk of accident and injury due to the failure of the master to exercise reasonable care in furnishing him with a reasonably safe place to do his work; but he does assume all risks which are necessarily incident to his employment, or which are obvious or known to him. Subject to the rule that he does not assume risks created by reason of the master's negligence, a servant cannot recover for injuries resulting from defective or dangerous machinery or appliances, where the risks are incident to the employment, or are known, or ought to be known, by him. *German-American Lumber Co. v. Brock*, 55 Fla. 577, 46 So. 740; *Atlantic Coast Line R. Co. v. Beazley*, 54 Fla. 311, 45 So. 761; 26 Cyc. 1185, 1186. Where the master and servant are possessed of equal knowledge or means of knowledge of defects in machinery used and in dangers incident to its use, the servant assumes the risk, where he is normally competent to act for himself. 26 Cyc. 1202. To authorize the striking out of a plea on motion, it must not only be informal and bad, but it must be wholly irrelevant. *Hubbard & Hood v. Anderson*, 50 Fla. 219, 39 So. 107. A plea that is only wanting in explicitness or fullness should not be stricken out on motion. In such a case the proper method of attack is by demurrer or a motion for compulsory reformation. When a good defense is defectively stated, it should not be stricken out on motion. *Russ v. Mitchell*, 11 Fla. 80; *Southern Home Ins. Co. v. Putnal*, 57 Fla. 199, 49 So. 922. Where a plea has been erroneously stricken, a reversal of the judgment may follow, unless it clearly appears that no harm has resulted therefrom to the party complaining of it. *Seaboard Air Line Co. v. Rentz*, 60 Fla. 449, 54 So. 20.

While the fifth plea may not be perfect in form, it is not wholly irrelevant or improper. It was not subject to the grounds of the motion to strike addressed to it, since it at least tended to raise the special issue of assumed risk. See *Louisville & N. R. Co. v. Orr*, 84 Ind.

50, 14 Am. Neg. Cas. 484n. As the motion to strike the plea relates only to matter in the record proper, no exception to the ruling on the motion is required. *Barnes v. Scott*, 29 Fla. 285, 11 So. 48.

If the fifth plea is insufficient in substance, it could have been demurred to. If it is defective in form, a motion for compulsory amendment was the remedy, not a motion to strike. *Southern Home Ins. Co. v. Putnal*, 57 Fla. 199, 49 So. 922. This conclusion is not in conflict with the decision in *Flowers v. Louisville & N. R. Co.*, 55 Fla. 603, 46 So. 718.

As the fifth plea was erroneously stricken, and as it does not appear from the whole record that no harm therefrom resulted to the plaintiff in error, the judgment should be reversed.

The facts alleged in the seventh plea, which was stricken, could have been shown under the plea of not guilty or under the special plea numbered 6; therefore no harm resulted from striking the seventh plea.

The judgment is reversed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

HOBERT v. COLLINS, LAVERY & COMPANY.

[COURT OF ERRORS AND APPEALS OF NEW JERSEY, NOVEMBER 14, 1910.]

80 N. J. L. 425.

1. Negligence—Trespasser—Malicious Injury.

As against a trespasser a malicious or intentional injury is actionable, while a merely negligent act will not form the basis of recovery, because the duty to observe reasonable care is not owing to the trespasser.

2. Negligence—Trespasser—Anticipated Injury.

That a defendant might reasonably have anticipated a possible injury to a trespasser plays no part in determining wilfulness. There must be some evidence tending to show the maliciousness of the offender,—that is, his intention to do an injury,—else the jury are without authority to infer it.

3. Negligence—Trespasser on Wagon—Infant.

The rule that denies to a trespasser upon a moving wagon a duty on the part of the driver to observe care toward him, is not changed by the fact that he is an infant.

[Headnotes by the Court.]

Error to the Hudson County Circuit of the Supreme Court to review a judgment of nonsuit granted in an action brought to recover damages for personal injuries to plaintiff sustained while trespassing upon defendant's wagon.

For plaintiff in error—McDermott & Enright.

For defendant in error—William Brinkerhoff, and Brinkerhoff & Fielder.

VOORHEES, J. While the plaintiff, a boy of about nine years of

CASE NOTE.

Causing Trespassing Minor to Jump or Fall From Moving Wagon as Actionable Negligence.

The doctrine of the following cases on the above subject is not in harmony with that announced in *HOBERG v. COLLINS, LAVERY & COMPANY* (the case at bar.) The following cases base the right to recover for injuries sustained upon negligence, while the *HOBERG Case* takes the view that negligence

alone will not support a recovery unless it is malicious or intentional.

In *Brennan v. Merchant & Co.*, 205 Pa. 258, 13 Am. Neg. Rep. 672 (1903), it appeared that a boy about 8 years of age got upon the side of a truck wagon at a place between the wheels, which were moving at a moderate pace, and held himself on by grasping a standard or upright; the driver turned about, and without warning, struck the boy with his whip on the hand which was grasping the standard,

age, was playing with a companion in the street of Jersey City on which there were two street car tracks, one of the defendant's large two-horse trucks passed by empty, en route to the stable. The wagon, built to carry boxes, and open except for high racks at the sides, was in charge of a driver employed by the defendant. The two boys ran after the wagon, which was being driven on the south-bound car track, and jumped upon it to "steal a ride." They stood upon the spring or iron rod running across the rear of the wagon underneath the tailboard, and supported themselves by holding fast to the tailboard with their hands; their heads and shoulders extending above the top of the tailboard. The plaintiff was looking toward the driver, who was sitting in his seat at the front of the wagon, perhaps 12 or 15 feet away from the boys. Shortly after the boys had caught on the wagon, and while the horses were going on a walk, the driver turned around, and seeing them, struck back at them once with his whip, without any warning. It struck the plaintiff on his shoulder, so that he felt the hurt. The plaintiff in jumping, or attempting to jump off, fell from the spring in front of or near to a street car passing on the north-bound track in the opposite direction, which ran over and crushed his foot, necessitating amputation. The plaintiff said: "I was scared of the whip and I fell off. I did not jump. I couldn't jump. He was too fast with the whip. I couldn't help falling." It was in evidence that "the tail of the truck with Hoberg on it was just passing the front platform of the car when he jumped. He jumped right into the car. He ran right against the car." Still another witness testified: "I seen the driver strike at a boy with a whip, and I seen him jump off the truck and run towards the car and then the car hit him." At the close of the plaintiff's case, a motion to nonsuit was made and granted, and the judgment entered upon it forms the subject of review.

thereby either knocking him off or causing him to release his grasp and fall between the wheels, in consequence of which he suffered a severe injury. In reversing the judgment of the lower court directing a nonsuit in favor of the defendant, the court said: "At the time of the accident, Larkins (the driver) had the custody and management of the wagon, and was driving it for the owner, the defendant company. The driver's control of the wagon carried with it the employer's

authority to protect it and to prevent persons from getting on it, as well as to remove persons from it. It was not only the right of the driver to remove trespassers from the wagon, but also his duty to his employer to do so. He, therefore, was authorized to eject the boy from the wagon and could use the necessary force for that purpose. If his act in striking the boy was intended to remove him by force from the wagon, it would be the act of his employer for which the lat.

It is admitted that the plaintiff was a trespasser, but he contends that that fact under the proofs does not disentitle him to a recovery, and argues that support for the action is found in *Powell v. Erie R. Co.*, 70 N. J. L. 290, 17 Am. Neg. Rep. 316, 58 Atl. 930, in the following expression of the learned justice who wrote the opinion in that case, viz.: "Excessive or improper force applied in the effort to eject him would, of course, be actionable." The plaintiff also seeks to distinguish that case from the present because there the trespasser was intercepted in an attempt to board a moving train, an act made by statute a misdemeanor, as well as negligent; also because here there was an actual assault, but not in the *Powell* case. There the plaintiff was an able-bodied adult; here a child of nine years.

The plaintiff insists that it was due to him to refrain from wilfully injurious acts, and from such threats of violence as would, in the necessary attempt to avoid it, result in the plaintiff's losing his presence of mind and self-control. For the purpose of an examination of this case, it may be considered that the driver of the wagon, being in charge of the defendant's property, in the attempted protection of it by ousting trespassers from it, was acting within the scope of his employment, and thereby rendered his employer liable for his acts. The general doctrine, so often enunciated, that to a trespasser no duty is owed, save to refrain from a wilful and intentional injury, usually arises in cases having to do with acts of trespass upon land; yet there is no reason why the same principles should not obtain with reference to such personal property as may be the subject of a trespass committed upon it. Indeed, it has been indirectly applied to that class of property in *Friedman v. Snare & Triest Co.*, 71 N. J. L. 605, 61 Atl. 401, 70 L. R. A. 147, 108 Am. St. Rep. 764, (21 Am. Neg. Rep. 311), the personal property there consisting

ter would be responsible. If, on the other hand, the purpose of the driver was not to cause the boy to leave the wagon, but to inflict punishment upon him to gratify the ill will of the driver, the defendant company is not responsible for the wrongful or tortious act. It would not be an act done by the employee in the execution of his employer's business, although it was performed while he was in the service of the employer. It would be an act of the employee directed against the boy independently of the

driver's contract of service, and in no way connected with, or necessary for, the accomplishment of the purpose for which the driver was employed. The negligent performance of the act, therefore, would impose no liability on the employer. In exercising the right and in performing the duty to remove the boy from the wagon, the driver was required to use the care that a reasonably prudent man would exercise under the circumstances. His failure to observe such precaution in removing the child from the wagon

of iron beams which had been piled in the public highway. In recent times it has been applied where persons have wrongfully entered upon railway trains, and in these cases, the consideration of the status of a trespasser has frequently arisen, and they furnish examples of many recoveries by trespassers that have been sustained. These cases are not all in harmony, but it would seem that they all hold to the general principle above stated, varying greatly, however, in its application, and thus are productive of divergent conclusions. As against a trespasser, a malicious or intentional injury is actionable, while a merely negligent act will not form the basis of recovery, because the duty to observe reasonable care is not owing to the trespasser. To force a man from a rapidly moving railway train, it is well known, is to subject him to a hazard almost certain to result in loss of life or severe bodily harm. Such an act, therefore, if the conditions are known, is malicious and wrongful. To remove one from a railway car at rest is not an inherently dangerous act, nor one which commonly does, or is likely to, eventuate in harm, so that, if in fact an injury should result, it could be said to be wanton or wilful and intentional. The distinction has been quite fully set forth in *Bolin v. Chicago, St. Paul M. & O. R. Co.*, 108 Wis. 333, 84 N. W. 446, 9 Am. Neg. Rep. 209, 81 Am. St. Rep. 911, where the court says in part: "It is not sufficient, to indicate an intentional injury, that the party causing it had reasonable ground to expect that such a result was within reasonable probabilities; otherwise a violation of the duty to exercise ordinary care would of itself be sufficient to indicate such injury. The danger of inflicting a personal injury upon a person by the conduct of another must be such as to reasonably permit of a belief that such other either contemplated producing it, or, being conscious of the danger that it would occur, imposed that danger upon

would convict him of negligence for which his employer would be liable. The tender years of the child relieve him from any charge of negligence in entering upon the wagon. If it was the intention of the driver to remove or drive the boy from the wagon by striking him on the hand with his whip, and thereby causing him to fall or jump from the wagon, it was a grossly negligent act."

The facts in *Hyman v. Tilton*, 208 Pa. 641, 16 Am. Neg. Rep. 515 (1904), show that the plaintiff, who was a boy

about 10 years old, climbed upon a truck at the side between the wheels, and stood with one foot on an iron bar grasping one of the standards or uprights with his hands. After starting the horses at a slow trot, the driver ordered the boy to get off, and upon his failing to obey immediately because of the dangerous character of his position, struck at the boy with his whip. The last stroke of the driver's whip apparently caused the lash to become wound about his foot, thereby causing him to slip from the

such person in utter disregard of the consequences, to warrant saying reasonably that the circumstances indicate willingness to perpetrate such injury."

The declaration in this case is not strictly for negligence, but for a wilful and malicious act, with unnecessary force and violence, causing sudden fear and panic and mental distraction, thereby recognizing the rule herein referred to. The testimony of the plaintiff disclosed that he had stolen rides before, and that drivers had hit at him with their whips. He knew he was acting wrongfully, and the drivers would be apt to drive him off if they discovered him, as they had done on previous occasions. He said he was watching the driver to see if he would strike at him, and was expecting it, that he was ready to jump just as soon as the driver struck, but the driver "was too fast with the whip," and he fell. The horses were going on a walk all the time up to the occurrence of the accident.

If the rule concerning trespassers is to be applied in railroad cases, then, *a fortiori*, should it be applied in the present action. The usual cracking of a whip at a boy "catching a ride" on a slowly moving wagon is the demonstration complained of, but it is quite clear that such conduct was not sufficient to evince an intention to injure, nor were the circumstances such as indicate that the willingness to harm which is equivalent to an intent to produce that result. The wagon was not going at a greater rate of speed than it was when the trespasser, with apparent facility, boarded it. The watchfulness of the plaintiff was caused by the avowed apprehension and expectation of receiving the lash. The readiness to jump off was preparation for such necessity, and, as common knowledge indicates, the occurrence was one ordinarily met with among drivers. It would be going too far to say that a man of ordinary intelligence would expect under such circumstances an injurious result, or that there was any evi-

bar on which he was standing, or he became frightened and fell or jumped off, in consequence of which he suffered injury by the wheels passing over his leg. In upholding a judgment in favor of the plaintiff, the court approved the following instruction to the jury: "If the jury find that * * the plaintiff in this case, being then but ten years of age, climbed upon defendant's dray while it was being driven along the streets of the city of Philadelphia, and was engaged in rid-

ing thereon in a dangerous position, and one likely to expose him to risk of being thrown off and injured by the motion of the dray, and while the child was in this position, the driver, seeing the child on the dray, instead of stopping it and putting the child off, or allowing him to get off, without checking the speed of the horses, took his whip and struck at the child for the purpose of driving it off the dray or compelling it to get off while in motion; and if the jury further

dence of wilfulness to be submitted to a jury. That a defendant might reasonably have anticipated a possible injury to a trespasser plays no part in determining wilfulness. There must be some evidence tending to show the maliciousness of the offender,—that is, his intention to do an injury,—else the jury are without authority to infer it. Nor was there evidence to sustain a conclusion that the plaintiff, by reason of the defendant's act of whipping, lost his self-control. He did not claim it in the testimony. The most that he did claim was that the driver was "too fast." The whip struck the plaintiff on the shoulder. It did not even extend to his back. There was no evidence of excessive force or show of force. It is not perceived how otherwise the driver could have insisted upon the immediate cessation of the trespass, which undoubtedly he had a right to do, without abandoning his team in the public street. Perhaps the consciousness of wrong-doing played an important part with the plaintiff in causing his excitement. The fear of the wrong-doer is thus alluded to in *Planz v. Boston & A. R. Co.*, 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835: "The order to get off was addressed to him as a wrong-doer, and the fact that he was such would be likely to give force to the order, and help to cause the injury. It is fairly to be inferred that his consciousness of his fault, and his fear of punishment, operated with the order, and induced him to take the risk of jumping." The direction of a verdict in that case was sustained. In *Mugford v. Boston & M. R. Co.*, 173 Mass. 10, 5 Am. Neg. Rep. 611, 52 N. E. 1078, it appeared that the plaintiff was eleven and one-half years old, stealing a ride on a freight car. He was on the side of the car with his feet in the truss bar and both hands in handle of door. The train was moving slowly. A brakeman on top of the car saw the

find that the child was either knocked off the wagon by the force of the blow, or the pull of the whip catching his shoe, or through fright relaxed his grip of the side of the wagon and fell off and under the wheels and was injured, this is such negligence on the part of the defendant's servant as to render the defendant responsible for this suit."

A declaration which alleged that the plaintiff, who was a boy six years of age, was riding upon a wagon of low-gear driven by defendant's servant upon the highway, that the driver,

in a threatening manner while the wagon was in motion ordered him to get off, thereby frightening him so that, in attempting to obey the order, he fell and the wheels passed over him, was held in *Bucci v. Waterman*, 25 R. I. 125, 14 Am. Neg. Rep. 215 (1903), to state a cause of action of trespass on the case for negligence. "It is the duty of the driver of such vehicle," said the court, "when he wishes to eject from his wagon an intruder, six years old, to avoid injury to the child, and to give the child an opportunity to get off without injury."

boy, came towards him, raised his hand, and said, "Get off." The boy looked to see where he was jumping and jumped off, landing on a pile of cinders as he seemed to have intended to, and slipped under the car, which cut off both his legs. The court below directed a verdict for the defendant. Mr. Justice Holmes, in sustaining the direction, said: "This is not the case of a person being driven by threats of personal violence to jump off a car going at such a high rate of speed as to make it unreasonably dangerous immediately to insist upon the right to have the trespass ended. See *Lovett v. Salem & S. D. R. Co.*, 9 Allen, (Mass.) 557 [3 Am. Neg. Cas. 754]; *Kansas City, Ft. S. & G. R. Co. v. Kelly*, 36 Kan. 655 [3 Am. Neg. Cas. 437, 14 Pac. 172, 59 Am. Rep. 596]. The car was moving slowly. The command given by the brakeman was no other than the command of the law, and a command to do what the plaintiff by his own testimony intended to do a little later, when at least it would have been no safer so far as the speed of the train was concerned. It frightened the plaintiff to the point of obedience, but not to the point of automatic action or loss of judgment and self-control, as seems to have been the case in *Ansteth v. Buffalo R. Co.*, 145 N. Y. 210, [5 Am. Neg. Cas. 382, 39 N. E. 708, 45 Am. St. Rep. 607]." It is not shown by the evidence that the plaintiff was frightened to the point of automatic action and thus lost self-control; much less is there any indication that the driver's action was likely to produce that result. The use of the whip was notice that the trespass would not be tolerated. We think the case of *Powell v. Erie R. Co.*, 70 N. J. L. 290, 17 Am. Neg. Rep. 316, 58 Atl. 930, 1 A. & E. Ann. Cas. 774, is controlling in this particular.

Nor can the infancy of the plaintiff lead to a different result. The rule that denies to a trespasser a duty on the part of others to observe care toward him is not changed by the fact that he is an infant. This principle was applied in the so-called Turntable Cases. *Turess v. New York, S. & W. R. Co.*, 61 N. J. L. 314, 4 Am. Neg. Rep. 520, 40 Atl. 614, and *Delaware L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 4 Am. Neg. Rep. 522, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727, and, also, in *Friedman v. Snare & Triest Co.*, 71 N. J. L. 605, 61 Atl. 401, 70 L. R. A. 147, 108 Am. St. Rep. 764, (21 Am. Neg. Rep. 311). It is also held in Pennsylvania and Massachusetts. *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706, 10 Am. Neg. Cas. 103n; *Rodgers v. Lees*, 140 Pa. 475, 21 Atl. 399, 12 L. R. A. 216, 23 Am. St. Rep. 250; *Morrissey v. Eastern R. Co.*, 126 Mass. 377, 30 Am. Rep. 686, 12 Am. Neg. Cas. 88n.

The plaintiff, having failed to adduce evidence from which a jury

might legally infer a wilful and intentional injury, or an exhibition of force calculated to or which in fact did result in the loss of self-control of the plaintiff, the judgment of nonsuit will be affirmed.

JOHNSON v. GARY et al.

[SUPREME COURT OF IDAHO, NOVEMBER 14, 1910.]

18 Idaho, 623, 111 Pac. 855.

1. Master and Servant—Damage—Injury—Action—Pleadings.

Where it is alleged in the complaint that because of the personal injury received a total loss of earning capacity resulted, and that such injury was the result of the negligence of the defendants, a cause of action is stated, and in such a case the amount of damages sustained depends on the nature of the injury. If the evidence introduced without objection established the allegations as to bodily pain, mental anguish, and incapacity to earn money, the jury would be justified in finding a verdict for the plaintiff.

2. Appeal—Variance—New Trial.

Under the provisions of section 4225, Rev. Codes, no variance between the allegations and the proof is deemed to be material, unless it has actually misled the adverse party to his prejudice; and whenever there is such variance it is the duty of the adverse party to make seasonable objection on that ground, and if objection is not made it cannot be raised for the first time, either on motion for a new trial or on appeal.

3. Negligence—Explosion of Gun—Injury—Instructions.

In an action brought to recover damages sustained by one employed in herding sheep, caused by the explosion of an alleged defective gun, *held*, that the instructions given by the court fairly covered the case and substantially included all of the proper instructions requested by appellants.

4. Negligence—Injury—Explosion of Gun—Action—Sufficiency of Evidence.

In an action brought to recover damages for personal injuries sustained by one employed in herding sheep, caused by the explosion of an alleged defective gun, *held*, that there was a substantial conflict in the evidence and that the evidence was sufficient to sustain the verdict.

[Headnotes by the Court.]

Appeal by defendants from a judgment of the District Court of Ada County, rendered in favor of plaintiff in an action brought to recover damages for personal injuries resulting from the explosion of an alleged defective gun. Affirmed.

For appellants—Hawley, Puckett & Hawley.

For respondent—E. J. Frawley, and G. G. Adams.

NOTE.

On the subject of Pleadings in Negligence Actions, see note in 5 Am. Neg. Rep. 51.

And on the subject of Presumption and Proof of Negligence, English Rule, see 15 Am. Neg. Cas. 275.

Amici curiae—K. I. Perky, and John F. MacLane.

SULLIVAN, C. J. This action was brought to recover damages in the sum of \$20,000 alleged to have been incurred by reason of the defendant's furnishing the respondent, who was herding sheep for them, a defective gun, known as an "army musket," which exploded, and so injured the plaintiff's left arm that it resulted in an amputation thereof, and to recover the further sum of \$75 for medical treatment for such injuries. After alleging the copartnership of the defendants and the employment of the plaintiff by them to herd sheep, it is alleged that under the instruction of defendants it became plaintiff's duty to shoot off and fire a gun at intervals while in charge of said sheep, for the purpose of driving away wild animals; that it was the duty of the defendants to furnish plaintiff a safe and reliable gun to carry out such instructions; that defendants furnished plaintiff a gun for that purpose that was defective, unsafe, and dangerous, and was so known to be at the time of giving it to plaintiff, and that while in the discharge of such duties, and on April 4, 1908, and without the knowledge of the defects or unsafe condition of such gun, the plaintiff shot the same in the performance of his duty, and that the said gun exploded in his hands and shattered his left arm to such a degree that it had to be amputated; that by reason of such injury he was crippled and maimed, and became permanently unfit and incapable of earning a livelihood, and that such injuries were due to the negligence and want of care and precaution on the part of defendants and their agents; that plaintiff at the time of said accident was 48 years of age, strong and able-bodied, and capable of earning \$100 per month; that by reason of such injury his earning capacity had been entirely destroyed; that he was damaged in the sum of \$20,000, and \$75 in addition paid for medical treatment; and prayed for judgment in the sum of \$20,075.

To this complaint the defendants, who are appellants here, interposed both a general and special demurrer, which were overruled by the court, and defendants answered. They admitted the partnership of defendants and the hiring of plaintiff, but averred that he was simply employed as a herder under the order and direction of a foreman; denied that it was plaintiff's duty to shoot off a gun at intervals, or at any other time, or that it was the duty of the defendants to furnish the plaintiff with a gun, and denied that any gun was furnished plaintiff in the discharge of his duties as herder; denied that there was any defect in said gun, or that it was exploded in plaintiff's hands while in the performance of his duty; denied that he was injured by reason of any negligence or want of care or precaution on the part of the appel-

lants or their agents; denied that plaintiff was an able-bodied man and capable of earning \$100 per month; denied the claim of damages *in toto*; and averred that plaintiff of his own volition and contrary to the custom of persons engaged in the care and custody of sheep, and without any instructions from appellants, took said gun belonging to appellants, and loaded it to excess, and fired it off in an unusual way, and by reason of his own negligence and misdoing caused the injury from which he suffered.

The case was tried by the court with a jury. The jury found a verdict for the respondent, and assessed his damages at \$2,000. A motion for a new trial was denied, and the appeal is from the judgment and order denying the new trial. The overruling of the demurrer to the complaint is assigned as error; also the giving of certain instructions and the refusal to give others, the insufficiency of the evidence to justify the verdict, and the admission and rejection of certain testimony.

The court did not err in overruling the demurrer. It is first contended by counsel for appellants that the special demurrer, at least, should have been sustained by the court, for the reason that the complaint does not ask general damages by reason of the accident complained of, but asks for special damages for loss of earnings and money paid for medical treatment. The complaint alleges total loss of earning capacity, and prays for judgment on that account for \$20,000, and alleges that he expended \$75 for medical treatment. These allegations go to special damages. No special facts are averred on which to base the allegation that the loss of his arm totally destroyed his earning capacity. We are aware that it is held by very respectable authority that loss of earnings and loss of capacity to earn are held to require special averments therefor. 5 Ency. Pl. & Pr. 752, and note; 16 Ency. Pl. & Pr. 391, 449; *Mellor v. Missouri R. Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; *Chicago v. O'Brennan*, 65 Ill. 160. Good pleading requires the pleader to make such allegations as will apprise the opposite party of the nature of his claim and prevent surprise. In the case at bar, the gravamen of the claim alleged was the injury inflicted on plaintiff through defendants' negligence. The damages are the result of the injury thus caused. They are not the cause of action; they are simply collateral to it. When the plaintiff proved his injury caused by defendants' negligence, he was entitled to recover something. The amount of the damages sustained must depend on the nature of the injury. It must be conceded that, if he proved the allegations of his complaint, he was entitled to compensation in damages for bodily pain and mental anguish, as well as for permanent injury.

No objection was made to the introduction of evidence as to his

permanent disability, so the question of the necessity of allegations of special damages does not arise in this case. It is provided by section 4225, Rev. Codes, that no variance between the allegation in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits; and whenever it appears that the party has been misled the court may order the pleading to be amended upon such terms as may be just. Wherever there is a variance between the allegation and the proof that has actually misled the adverse party, it is his duty to make seasonable objection on that ground. It was held by this court in *Aulbach v. Dahler*, 4 Idaho, 654, 43 Pac. 322, that such objection cannot be raised for the first time on motion for a new trial or on appeal to the Supreme Court. It is not contended in this case that any objection was made during the trial of the case, or at all, to the effect that special damages could not be proved under the allegations of the complaint. It is clear from the record that the jury did not give plaintiff the amount of damages he would have been entitled to for total disability. It appears that plaintiff was 48 years old, and according to the American Table of Mortality, the expectancy of life of such a person is 22.36 years; and, as the jury only rendered a verdict for \$2,000, it is clear that they did not render their verdict on the basis of total disability or total loss of earning capacity. It is next contended that the court erred in refusing to give certain instructions asked by the defendants. We have examined those instructions, and in the most of them find the law is correctly stated. On an examination of the instructions given by the court, we find that they fairly cover the case and substantially include all proper instructions requested by appellants.

The insufficiency of the evidence to justify the verdict is assigned as error, and after a careful consideration of the evidence we are satisfied that it is sufficient to sustain the verdict. There is a substantial conflict in the evidence in some material matters, and there appears to be uncertainty as to the date when the injury occurred; but from all of the evidence we are not able to say that the jury did not arrive at a correct verdict. The judgment is therefore affirmed, with costs in favor of the respondent.

LYNCH v. AMERICAN BREWING COMPANY et al.

[SUPREME COURT OF LOUISIANA, JANUARY 16, 1911.]

127 La. 848.

Negligence—Fall of Door—Action for Injury—Sufficiency of Petition.

The petition in an action brought to recover damages sustained by a person upon whom a door fell while she was in a building attending to the storage of her furniture, is defective for failure to allege that she was on the defendant's premises at the time of the alleged injury, that she was on such premises lawfully, that the injury was sustained by reason of the fault of the defendant, and that she was not at fault herself.

Appeal by plaintiff, Mary Ellen Lynch, from a judgment of the Civil District Court, Parish of Orleans, dismissing an action brought to recover damages for personal injuries caused by a door falling upon her. Affirmed.

For appellant—Fergus Kernan.

For appellees—Gustave Lemle and Arthur A. Morena.

BREAUX, C. J. The plaintiff, a seamstress, brought this action against the defendants to recover damages in the sum of \$10,000. Her complaint is that on the 16th day of August, 1907, she met with an accident which caused her severe bodily and mental pains for which the defendants are liable. She avers that, while storing her furniture and sewing machine on property described in her petition as belonging to defendants, owing to defendants' negligence, in allowing the use of the door of the stable on the property, which opened and closed on trolley wheels, and was unsafe and dangerous in the position in which it was, she was very badly hurt by the door falling and striking her, the weight of the door threw her to the ground and crushed her, and inflicted permanent injury from which she suffered excruciating pains; that the fact that the door was dangerous as it unsafely hung on the hinges should have been known to the defendants at the time; that she knew nothing of the danger as the defect was not apparent, and could only be detected after minute and close inspection; and that it was, none the less, a menace and a threatening danger to any one who might

NOTE.

On the subject of Averment of Negligence in Complaints, see note in 5 Am. Neg. Rep. 51.

And on the subject of Presumption and Proof of Negligence, English Rule, see 15 Am. Neg. Cas. 275.

pass through the door. That Frank Kramer, one of the defendants, was a tenant of the American Brewing Company, the owner. She details with minute particularity all the wrongs imposed and the injury suffered, but she failed to allege that she had a right to be on the premises, or that she was wantonly injured by defendant or any of its agents or employees. The cause came up before the district court on the plea of no cause of action, interposed by defendants. The court maintained the plea and dismissed the suit. The plaintiff appeals.

DISCUSSION—DECISION: Plaintiff has not averred a distinct issue for which the defendants are liable. There is no complete cause of action averred. It was an essential matter for plaintiff to allege how it was that she was on defendants' premises at the time; and she should have averred that she was not at fault, and that she had a right to be where she was. It is almost useless to say that one may sue for injury sustained while he is on the property of another, but it is important to account for his presence on the property; otherwise, he is without cause of action. The presumption is in favor of ownership and all of the rights which arise from ownership. The right to be on another's premises and store furniture thereon should have been averred. The owner may have a loose door in one of the buildings on his place. If a third person passes therein and meets with an accident, it should be alleged in the petition that the act which the person was doing was lawful. That he was not a mere trespasser should be, in some way, shown. Until that allegation is made, the owner cannot be considered at fault or liable in any way. It is not a matter of evidence, but it is a matter of allegation. On the face of the petition, it does not appear that plaintiff had the least right to be on the property or to store her furniture there. A plaintiff may not prove what he does not allege. The rules of practice are unbending. Reasonable certainty is required in pleading. It conduces to strict impartiality. The rules of practice should not be relaxed or set aside in order to enable parties to supply or cure an omission, in the petition on the merits, by testimony which may or may not be produced. A cause of action ought to be alleged in due time. There remains only one alternative; it is to affirm the judgment. For reasons stated, the judgment is affirmed.

PECK v. RHODE ISLAND COMPANY.

[SUPREME COURT OF RHODE ISLAND, JUNE 12, 1911.]

32 R. I. 449.

1. Street Railroads—Crossing—Contributory Negligence.

A person who crosses the tracks of an electric railroad company must exercise ordinary care for his own safety, in order to exonerate himself from the charge of contributory negligence.

2. Street Railroads—Driving upon Track—Contributory Negligence.

One who chooses to drive upon the tracks of an electric railroad company simply for his own convenience, and not because of any condition of the road or the use of the same by vehicles thereon which requires him to leave the ordinary traveled part, acquires no right of way superior to that of the railway company, and he must constantly keep in mind that he is in a place of danger, and be prepared to exercise diligence to prevent collision with cars.

3. Street Railroads—Driving on Track—Contributory Negligence.

A person who had in the daytime traveled over a road in which the tracks of an electric railway company were located, and in the night time drove along the car tracks in such road without looking for approaching cars, is guilty of negligence as matter of law, precluding a recovery by him for injuries resulting from a head-on collision.

Exceptions by plaintiff to a judgment of the Superior Court of Providence and Bristol Counties, rendered in favor of the defendant in an action brought to recover damages for injuries caused by collision with an electric street car. Exceptions overruled.

For plaintiff—John P. Beagan.

NOTE.

On the subject of Liability of Street Railway Company for Collisions Between Street Cars and Vehicles, see note in 8 Am. Neg. Rep. 240.

And on the subject of Right of Way on Street Car Tracks, see note in 8 Am. Neg. Rep. 243.

And on the subject of Collisions Between Street Cars and Vehicles at Crossings, see notes in 11 Am. Neg. Rep. 57, 154, 241.

And on the subject of Contributory Negligence of Persons Crossing Track, see note in 9 Am. Neg. Rep. 557.

And on the subject of Collisions of Street Cars With Other Vehicles, see note in 15 Am. Neg. Rep. 419.

And on the general subject of "Collisions and Crossings," see Vols. 11 and 12 Am. Neg. Cas., where the cases from the earliest period to 1896, decided in the States and Territories and the Federal and Supreme Courts of the United States, are reported and classified and arranged in alphabetical order of States. For subsequent cases see Vols. 1-21 Am. Neg. Rep., and this volume (1 N. C. C. A.) and succeeding volumes of Negligence and Compensation Cases Annotated.

For defendant—Joseph C. Sweeney and Alonzo R. Williams.

DECLARATION.

John W. Peck, of the town of Seekonk, in the Commonwealth of Massachusetts, complains of The Rhode Island Company, a corporation duly created, located and doing business in East Providence, County of Providence and State of Rhode Island, said defendant having been summoned by the sheriff in an action of trespass on the case for negligence:

For that the plaintiff on the, to wit, 31st day of October, A. D. 1905, was lawfully and rightfully in and upon Prospect Street, a certain public highway in said Town of East Providence, engaged in driving a wagon with horse attached and in the exercise of due care and diligence upon his part and was entitled to proceed upon his way without molestation or interference from anyone or from the defendant corporation.

And the defendant on said 31st day of October, A. D. 1905, was a common carrier of passengers for hire, operating cars propelled by electric power over and upon railway tracks in the streets and highways of said Town of East Providence and to and along said Prospect street, and on said day, said defendant operated a car along said Prospect street, which was propelled by electricity and was under the care, control and management of the defendant, its agents and servants.

And it was the duty of said defendant to operate, manage and control said car while running on said Prospect street at such a moderate rate of speed as not to endanger the safety of persons in and upon said street and so as not to endanger the safety of the plaintiff.

Yet said defendant disregarding its aforesaid duty in this behalf, then and there so negligently, carelessly, unskillfully and immoderately ran, operated, managed, guided, governed and controlled said car, when at or near the rise on said Prospect street, near where said Prospect street is crossed by the steam car tracks, that said car ran into, head on, and collided with the said plaintiff, who was riding in his said wagon, as aforesaid, and with such force and violence that he was thrown from and off the seat of his wagon and to and upon the ground and his rib was fractured, two fingers on his left hand severely injured, one of them broken, both legs and knees injured, deep cuts caused on his head and he was severely bruised and injured about various parts of his body and he suffered a severe shock to his nervous system, all of which injuries and shock are permanent in their nature and he has suffered, still suffers and will continue to suffer great pain and mental distress from the injuries so inflicted as aforesaid and has

been, and will be, put to great expense for care, nursing, medical attendance and medicine, and has been and will be unable to prosecute his ordinary occupation as heretofore; the horse which he was driving was killed, the harness was broken, all of which was to the damage of the plaintiff.

That said injuries and damages suffered were wholly the result of the carelessness of the defendant, its agents and servants and the plaintiff was guilty of no fault or neglect contributing thereto.

And the plaintiff was otherwise damnified and injured.

For that the plaintiff on the, to wit, 31st day of October, A. D. 1905, was lawfully and rightfully in and upon Prospect street, a certain public highway in said Town of East Providence, engaged in driving a wagon with horse attached, and in the exercise of due care and diligence upon his part and was entitled to proceed upon his way without molestation or interference from anyone, or from the defendant corporation.

And the defendant on said 31st day of October, A. D. 1905, was a common carrier of passengers for hire, operating cars propelled by electric power over and upon railway tracks in the streets and highways of said Town of East Providence, and to and along said Prospect street and on said day, said defendant operated a car along said Prospect street, which was propelled by electricity and was under the care, control and management of the defendant, its agents and servants.

And although said car was equipped with an apparatus, to wit, a gong designed to warn people of the approach of said car, which it was the duty of said defendant corporation, its agents and servants to use and operate so as to warn persons rightfully on said highway and within the tracks of said company.

Yet said defendant disregarding the duty devolved upon said defendant to warn said plaintiff of the approach of said car, to wit, by striking and sounding said gong, carelessly and negligently neglected to strike or sound said gong or warn said plaintiff and thereby said car, when at or near the rise on said Prospect street, near where said Prospect street is crossed by the steam car tracks, ran into, head on and collided with the said plaintiff, who was riding in his said wagon as aforesaid and with such force and violence that he was thrown from and off the seat of his wagon, and to and upon the ground and his rib was fractured, two fingers on his left hand severely injured, one of them broken, both legs and knees injured, deep cuts caused on his head and he was severely bruised and injured about various parts of his body and he suffered a severe shock to his nervous system, all of which injuries and shock are permanent in their nature and he has

suffered, still suffers and will continue to suffer great pain and mental distress from the injuries so inflicted as aforesaid, and has been and will be put to great expense for care, nursing, medical attendance and medicine, and has been and will be unable to prosecute his ordinary occupation as heretofore; the horse which he was driving was killed, the harness was broken and damaged, and the wagon upon which he rode was broken, all of which was to the damage of the plaintiff.

That said injuries and damages suffered were wholly the result of the carelessness of the defendant, its agents and servants and the plaintiff was guilty of no fault or neglect contributing thereto.

And the plaintiff was otherwise damnified and injured.

To the damage of the plaintiff in the sum of \$10,000, as laid in his writ dated the 9th day of July, A. D. 1906.

Wherefore he sues.

DUBOIS, C. J. This is an action of trespass on the case for negligence, brought in the superior court for damages resulting from the head-on collision of an electric car of the defendant company with the horse and wagon of the plaintiff, in the evening of October 31, 1905, on Pawtucket Avenue, in the town of East Providence. The negligence complained of was that the defendant operated its car at an immoderate rate of speed, and also neglected to give warning of its approach by sounding its gong. The plaintiff, who was driving his horse at the time of the accident, testified, at the jury trial of the case in the superior court, that it was foggy at the time, and that, although he was driving in the car track, he did not know of its existence, and knew nothing of the approach of the car until its headlight appeared, 125 to 130 feet away, when he attempted to turn out of the way, but was unable to do so in time to avoid being struck. He also testified that he drove over the same road in the morning of that day, but did not observe that there was any car track thereon.

At the conclusion of the testimony the justice presiding at the trial in the following language directed the jury to return a verdict for the defendant: "The plaintiff drove along this very road in Pawtucket in the morning, in broad daylight, and must have known that the car track was on the highway, although he says he did not. It is almost inconceivable that a man could drive along a road, with an electric car track on the road in plain sight, and not know. On his way home he says it was dark, and he drove along the right-hand side upon this track, in such a condition that, as he says, he could not see a car, with a fog there, although persons at the railroad crossing, several hundred feet farther from the car than he was, looked right by him some 700 or defendant in permitting noxious weeds to grow amounts to a public

800 or 1,000 feet, and could see the headlight on this car. He says he was utterly oblivious of the fact that the car track was there. He says he was paying attention in order to avoid colliding with some other vehicle, disregarding the car track entirely—was not looking for any car or light or any sound. Now, the law is that a person traveling upon the railroad track must pay some attention to his own safety, must look ahead for a light, look and listen for the sound of the bell. The circumstances are quite different from what it would have been if the car had run up to him, may be from behind. On a track like that he could see that car with this headlight more easily than the motorman could see him without any light on his team. Gentlemen, I consider this a case of contributory negligence. The plaintiff was paying no attention whatever, as he says himself, was entirely oblivious to the fact that the car was there, was not looking for a light, or listening for a bell, or any sound on that car, until the car got so close to him that the motorman was not able to check the speed of the car; hence the collision occurred. If you should render a verdict for the plaintiff in this case, I should consider it my duty to set it aside. Therefore you may return a verdict now for the defendant."

To this ruling the plaintiff excepted, and the case is now before this court for consideration upon the plaintiff's bill of exceptions, upon the grounds that the verdict is against the law and the evidence.

We are unable to perceive any error in this direction of the court. As was said by this court, speaking through Mr. Justice Rogers, in *Beerman v. Union R. Co.*, 24 R. I. 275, 279, 52 Atl. 1090, 1091: "A railroad track, whether steam or electric, is a place of danger, and a person crossing it, whether on foot or in a vehicle, must exercise ordinary care for his own safety to exonerate him from the charge of contributory negligence, and what is ordinary care under one set of circumstances might amount to negligence under a different set of circumstances. Ordinary care is such care as a person of ordinary prudence exercises under the circumstances of the danger to be apprehended. The greater the danger the higher the degree of care required to constitute ordinary care, the absence of which is negligence. It is a question of degree only. The kind of care is precisely the same. *Young v. Citizens' St. R. Co.*, 148 Ind. 54, 58 (47 N. E. 142, 2 Am. Neg. Rep. 703); *Prue v. N. Y. P. & B. R. Co.*, 18 R. I. 360, 369 (27 Atl. 450, 12 Am. Neg. Cas. 578n)." A person who chooses to drive upon and along a railroad track simply for his own convenience, and not because of any condition of the road or the use of the same by the vehicles thereon that requires him to leave the ordinarily traveled part thereof, acquires no right of way by so doing that is superior to that

of the railroad company owning such track. He must constantly bear in mind that it is a place of danger, and be prepared to exercise diligence to prevent collision with cars thereon.

As to his claim that he did not see the track, and did not know that it was there, this cannot avail him as an excuse; for, as was said in *Cones v. Cincinnati, etc., Ry. Co.*, 114 Ind. 328, 330, 16 N. E. 638, 639: "The law will assume that he actually saw what he could have seen if he had looked, and heard what he could have heard if he had listened." The law therefore assumes that he had knowledge of the existence of the track. In addition, it appeared in evidence that there were incandescent electric street lights at intervals along the road, which must have lighted the track sufficiently to attract the attention of an ordinarily careful and prudent man. In these circumstances the court was justified in directing the jury to return a verdict for the defendant. As we said in *Nicholas v. Peck*, 20 R. I. 533, 4 Am. Neg. Rep. 268, 40 Atl. 418: "Though ordinarily the question of contributory negligence is for the jury, we think the plaintiff's negligence is sufficiently clear for the court to hold that he was negligent as a matter of law."

The plaintiff's exceptions are therefore overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

FANTON v. BYRUM.

[SUPREME COURT OF SOUTH DAKOTA, NOVEMBER 2, 1910.]

26 S. Dak. 366.

1. Justice of the Peace—Service of Summons—Time—Waiver of Irregularity.

The appearance of a defendant by his attorney on the return day of a summons issued by a justice of the peace, and his consent to the adjournment of the case to an agreed date, operates as a waiver of the objection that the summons was made returnable in less time than was prescribed by statute.

2. Parent and Child—Tort of Child—Action for Wages—Damages as Counter-Claim.

Damages to property caused by the wilful acts of a minor employee in setting fires on the property of a third person which spread to the lands of the employer and negligence in driving the latter's team, cannot be interposed as a defense and counterclaim to an action brought by the parent of the minor to recover compensation for the minor's services.

Appeal by defendant from a judgment of the Circuit Court of Sully County, rendered in an action brought to recover compensation for services rendered by a minor, in which defendant set up as a counterclaim damages sustained by him caused by the wilful acts of the minor in setting fires and negligence in driving team. Affirmed.

For appellant—Matthew W. Murphy, and A. C. Byrum.

For respondent—Gaffy & Stephens.

SMITH, J. Appeal from the circuit court of Sully county Respondent Edwin F. Fanton, brought an action in justices' court, alleging in his complaint that on the 1st day of April, 1907, he entered into a verbal contract with defendant, appellant here, whereby the plaintiff hired his minor son, John Fanton, to the defendant for a period of eight months at the rate of \$27 per month; that said John Fanton worked as a farm hand under said contract for the full period of eight months; and that there is due and remaining unpaid for said services the sum of \$99.98. The summons in said action was personally served on the defendant December 26, 1907, and was returnable on the 28th

NOTE.

A search has disclosed no case, aside from FANTON v. BYRUM (the case at bar), on the subject of the right of an employer to set up as a counterclaim

damages sustained by him, in consequence of the negligence or wilful misconduct of a minor employee, in an action brought by the latter's parent to recover compensation for the minor's services.

day of December, 1907. On the return day of the summons, J. W. Slater appeared as attorney for plaintiff, and James Temmey, appearing specially for defendant, asked a continuance of the trial until January 2d, and by consent of both parties the cause was set down for trial on that date. At the time set, the defendant appeared specially by his attorneys, James Temmey and A. G. Brower, and "filed written objections to the jurisdiction of the justice," and asked that the case be dismissed, for the reason that the case was adjourned without issue being joined and for the further reason that the special appearance of the defendant was not sufficient to give the justice jurisdiction of the defendant. Motion overruled and exception taken. The defendant, Byrum, thereupon filed his answer to the complaint, admitting that "John Fanton worked for defendant, for a period after the 1st day of April, 1907, but alleging that he performed his work, labor and services in such a negligent and careless way that his services were of no value to this defendant but were an injury. Defendant, further answering, denies each and every allegation of the complaint except as above admitted. The answer further alleges by way of counterclaim that said John Fanton is the minor son of plaintiff, and performed the services for which plaintiff seeks to recover in this action; that on the 5th day of November, 1907, said minor set on fire certain prairie lands, which fire destroyed sheep, hay and straw belonging to the defendant, to his damage in the sum of \$95. For a further counterclaim defendant alleges that said John Fanton, while in the employment of defendant, being in charge of defendant's team on two occasions, negligently and carelessly handled the same, allowing them to run away, causing damage to the team in the sum of \$5 which has not been paid. Plaintiff filed a demurrer to each of these counterclaims, on the ground that the answer does not state facts sufficient to constitute a cause of action against the plaintiff as to either of the counterclaims. The justice sustained the demurrer as to the first of the two counterclaims to which ruling the defendant excepted. Upon the trial the defendant offered to prove by witnesses that the minor son of the plaintiff, while performing services under the contract made between plaintiff and defendant, set on fire prairie land, which fire destroyed property described in defendant's answer to the defendant's damage in the sum of \$100, "for the purpose of showing that the services were of no value to the defendant." Plaintiff objected to this evidence for the reason that it was incompetent; the court having sustained the plaintiff's demurrer to that counterclaim. The court sustained this objection, to which defendant excepted. So far as the record disclosed, no evidence was offered by defendant under the second counterclaim, and the jury re-

turned a verdict for plaintiff in the sum of \$99.98, upon which the justice entered judgment, together with costs, amounting to the sum of \$165.03. Defendant thereupon appealed to the circuit court of Sully county, upon a statement of the case embodying substantially the foregoing facts, and upon such appeal the circuit court affirmed the judgment of the lower court. Appellant brings the action to this court for review upon the questions raised upon the record, and assigns as error: (1) The overruling of defendant's motion for a dismissal of the action on January 2, 1908; (2) that the justice erred in sustaining the demurrer to the first counterclaim of defendant; (3) that the court erred in sustaining plaintiff's objection to proof of the facts alleged in the counterclaim, "for the purpose of showing that the services were of no value to the defendant."

The question whether the service of a "short-time" summons in justices' court was sufficient to give the court jurisdiction so far that a judgment founded upon such service was voidable merely and not void was before this court in *Kerr v. Murphy*, 19 S. D. 184, 102 N. W. 687, 69 L. R. A. 499. It was held in that case that, while the provisions of the Code as to service are mandatory, such service is voidable only, and that the judgment, while irregular, is not void. The court there quotes with approval the language of Redfield, C. J., in *Hammond v. Wilder*, 25 Vt. 343. "It is but a defect of service and not more important than thousands of other defects. It was never supposed before, that because the proper time was not given to a defendant to prepare for trial, the whole proceedings were rendered utterly void." That an irregularity in service of the summons may be waived, and is waived by a general appearance in the action, is settled law. Appellant's contention that under the provisions of Justice Code, § 10, there must be both an appearance and a pleading to give the court jurisdiction, is correct in a case where there has been no service of a summons; but such is not this case. In this case there was defective service; but the defect was such that it might be waived by the defendant by a general appearance in the action. It cannot be contended that the appearance of defendant by his attorney, on the return day of the summons to ask for a continuance, and his consent in open court that the case be set down for trial on a day certain, which was granted, did not then and there constitute a general appearance and a complete waiver of the defect in the service of the summons. This waiver on the return day left the defendant without right to object to the sufficiency of the service at the later date set down for the trial of the cause and the trial court committed no error in so holding.

Defendant's third assignment of error is without merit. The evi-

dence offered tending to show wilful or negligent acts of the minor to the damage of the defendant, for the purpose of showing that the services of the minor "were of no value to the defendant," was wholly incompetent. Such acts, if proved, would not affect the value of work and labor actually performed by the minor. But appellant contends that negligent or wilful acts of the minor committed in the course of his services as an employee of defendant may be proved upon a counterclaim in an action by the father to recover for services of the minor son, and insists that this question is presented by the assignment of error in sustaining plaintiff's demurrer to defendant's counterclaim.

In determining this question it becomes necessary to consider the specific allegations of the counterclaim demurred to. The act of the minor alleged constitutes merely a wilful tort on his part, in the setting of prairie fire on lands not belonging to the employer, but which fire spread over and upon his employer's land and caused the damage. It is not alleged that this act was done under the direction or with knowledge of the parent, nor that it was negligently done in the course of work the minor was performing for his employer. Under the facts as alleged in the counterclaim, the act of the minor was mere wilful tort, committed during the time he was in the employment of defendant, and which happened to injure his employer. The wilful act bears no relation whatever to the employment, or the contract to pay for the minor's services, and creates no other or different liability on the part of the father than would have existed had the contract of employment never existed. If the defendant in this action could not maintain an action against the parent for this same act, then defendant cannot plead it by way of counterclaim. Upon this question there is no room for discussion. Section 126, Civ. Code, provides: "Neither parent nor child is answerable as such for the act of the other." In *Johnson v. Glidden*, 11 S. D. 237, 5 Am. Neg. Rep. 97, 76 N. W. 933, 74 Am. St. Rep. 795, this court said: "It is a rule of the common law that 'a father is not liable in damages for the torts of his child committed without his knowledge, consent, participation, or sanction, and not in the course of his employment of the child.' "

The judgment of the trial court must be affirmed.

HASHMAN v. WYANDOTTE GAS COMPANY.

[SUPREME COURT OF KANSAS, NOVEMBER 5, 1910.]

83 Kan. 328, 111 Pac. 468.

1. Gas—Explosion—Evidence.

Although there was no direct evidence that the natural gas which exploded and injured appellee came from the gas pipes of appellant, the fact that on two different occasions just before the explosion gas came up through the ground, caught fire, and burned above appellant's gas pipes close to the place of the explosion, together with the fact that the pipes had been in the ground a considerable time, and had rusted and scaled to quite an extent, justified the inference drawn by the jury that the gas which exploded and caused the injury came from the pipes of the appellant.

2. Gas—Escape—Explosion—Injuries.

The burning of escaping gas on the streets in which the pipes were laid and in a densely populated section of the city justified the inference that the appellant knew, or should have known, of the defective condition of defendant's gas pipes.

3. Trial—Special Interrogatories.

In asking for the submission to the jury of special interrogatories, it is the duty of counsel to frame each question so as to present only a single, direct, and material fact, one which is within the issues of the case.

4. Gas—Care—Inspection of Pipes.

Natural gas is inflammable and explosive in a high degree and a very dangerous agency and those who transport it are bound to exercise great care, to maintain safe pipes, and to inspect them carefully to detect any leaks or defects.

[Headnotes by the Court.]

Appeal by defendant from a judgment of the Court of Common Pleas of Wyandotte County, rendered in favor of plaintiff in an action brought to recover damages for personal injuries caused by an explosion of gas. Affirmed.

For appellant—J. W. Dana, and Geo. R. Allen

For appellee—Daniel Carson & Jas. F. Getty.

JOHNSON, C. J. In an action brought by Charles Hashman against the Wyandotte Gas Company, he alleged that he was seriously in-

NOTE.

On the subject of Liability for Explosions, see notes in 7 Am. Neg. Rep. 535; 8 Am. Neg. Rep. 544; 9 Am. Neg.

Rep. 657; 13 Am. Neg. Rep. 434; 10 Am. Neg. Rep. 87, 17 Am. Neg. Rep. 29.

jured by an explosion of gas that had accumulated in a catch-basin from leaky and defective pipes which the gas company had laid and had negligently maintained in the streets of Kansas City. The jury returned a verdict awarding damages to Hashman in the sum of \$1,500, and returned with it answers to a number of interrogatories. The company appeals, and one of its principal contentions is that the findings and verdict are not supported by the evidence. It is true, as appellant contends, that there is no direct evidence of the escape of the gas which exploded and injured the appellee; but there is testimony which appears to warrant the inference that it came from the defective pipes maintained by appellant, and that appellant is responsible for the injury inflicted. Direct proof of evidence is not essential to a recovery, as negligence may be established by circumstantial evidence alone. If the circumstances proved fairly authorize the inference of negligence, and the jury have drawn that inference, it is enough. The fact that the result is not free from doubt, or that different persons might draw different conclusions from the same testimony, is not a good reason for disturbing the verdict. As was said in *Railway Co. v. Wood*, 66 Kan. 613, 72 Pac. 215: "Circumstantial evidence in a civil case, in order to be sufficient to sustain a verdict, need not rise to that degree of certainty which will exclude every reasonable conclusion other than the one arrived at by the jury." Here there was direct proof that quite a number of gas pipes for carrying gas were laid and maintained in the streets near the point of the explosion. These pipes were of different sizes; some of them being of twelve inches in diameter, some eight inches, some six inches, and some four inches. Some of them had been in the ground about nine years and were considerably rusted and scaled. To prove that gas escaped from them, testimony was offered to the effect that about two or three weeks before the accident gas which came up from the ground was found burning on the street near the corner where the explosion occurred. About four days before the accident, gas was found escaping from the pavement about ten feet from the place of the accident, and it was burning. When appellee and his companion sat down on the edge of the catch-basin, he struck a match for the purpose of lighting his pipe, when the explosion occurred, which threw him about fifteen feet, and the shock was sufficient to break plate glass windows in the adjacent buildings. A witness who was uncertain about the time, but afterward said it was subsequent to the explosion in question, said that he saw gas escaping from the pipes, and that one of the pipes had a hole in it from which the gas whistled as it passed and he could feel its force against his hand. Another explosion occurred near the same

place in July of the same year, but, of course, proof of what occurred subsequent to the explosion which caused the injury can only have a limited application. The appellant finally took out an old service pipe, which connected with the main pipe near the place of the accident. It passed under the tracks of the electric railway and was subject to disintegration and electrolysis. After the removal of this pipe no escaping gas was found in that locality, and there were no more explosions. These facts, including incidental ones of less importance, are sufficient to warrant the finding that gas escaped from the defective pipes of appellant through which it was being transported.

It is contended that, if defects or leaks existed, there was no proof that appellant had notice of them. Natural gas, as all know, is inflammable and explosive in a high degree, a very dangerous agency, and those who transport it are held to the exercise of great care; they are required to lay and maintain pipes that are safe and secure for transporting gas and carefully to overlook and inspect the pipes in order to keep them in a safe condition and to detect and repair any leaks or defects in them. Now, there is no direct evidence that any one informed appellant of escaping gas at the place where the explosion occurred, but the fact that gas was oozing through and burning on the streets in a densely populated part of the city several days before the explosion was sufficient to bring the matter to the attention of the gas company if it had been using an efficient system of inspection. The taking of reasonable precautions for the detection of leaks would have acquainted defendant with the defects in ample time to have repaired them. The jury has a right to infer that the gas company knew, or should have known, of the leaks and defects before the explosion. There is testimony that some inspection was made by the company to discover defects; but whether it exercised proper diligence or took the necessary precautions for the safe conduct of the gas through that portion of the city was a fair question of fact for the jury.

There is a contention that the special findings are inconsistent with the general verdict. One answer of the jury is that they did not know whether defendant had notice that the gas pipes in the vicinity of the explosion were old, worn, and defective, and it is contended that this is equivalent to a finding that they had no notice. This answer manifestly meant that the company had no direct notice of the condition of the pipes, and this is disclosed by other findings of the jury. The next answer was to the effect that gas burning in the street of itself suggested to the company the likelihood that there were defects in its pipes in that section, and in still another finding they said the company had notice of a leak prior to the explosion. Reading the findings

together, they show that the company knew, or in the exercise of ordinary care should have known, of the leakage of the pipes in time to have repaired them.

It is contended that another finding is inconsistent with the general verdict. To the question, "Aside from the fact that the defendant owned the gas mains in the streets, and that gas accumulated in the catch-basin in question, and exploded on March 18, 1907, and was seen a couple of times within two weeks prior to the explosion along the curb line while paper was being burned, whatever fact, if any, do you find, showing any defects in the defendant's gas mains, prior to March 18, 1907?" The answer was, "None." This general answer narrows to some extent the evidence of defects in the pipes; but, when these facts are read in the light of the testimony relating to them, and the inferences which go with them are considered, it cannot be said that it conflicts with the general verdict, or that there is an insufficient basis for the verdict.

Two special questions asked were properly refused. Each was complex in construction and embraced a number of distinct facts. In submitting questions it is the duty of counsel to frame each question so as to present a single, direct, and material fact involved in the issues of the case, and in that way give the jury fair opportunity to return a positive, direct and intelligible answer. *Atch. T. & S. F. R. R. Co. v. Aderhold*, 58 Kan. 293, 49 Pac. 83, 2 Am. Neg. Rep. 546. Complaint is made as to the admission of evidence as to the condition of the pipes subsequent to the explosion; but the trial court in its instructions properly limited the purpose and effect of this testimony, and of his instructions there is no complaint. There is nothing substantial in the contention that the award of the jury was excessive, nor do we find any material error in the proceedings.

Judgment affirmed. All the Justices concurring.

DANIELS et al. v. RANDOLPH COUNTY COURT.

[SUPREME COURT OF APPEALS OF WEST VIRGINIA, NOVEMBER 7, 1911.]

69 W. Va. 676.

1. Highways—Defects—Care.

Where an old road or way becomes dangerous to travel and is abandoned for a new location which is established, public authorities in charge of the work must put up barriers or warnings to protect persons traveling thereon, acting upon the belief, justified by appearances, that the old way is still open, and it is negligence not to do so.

2. Highways—Injuries at Night—Contributory Negligence.

While persons traveling on a public highway in the night time are required to exercise such ordinary care and caution as a reasonably prudent man would exercise under the circumstances, and in view of the darkness, they have the right, in the absence of knowledge to the contrary, to act on the assumption that such highway is in a reasonably safe condition for travel by night as well as by day, and are not bound to anticipate dangerous defects therein without some notice or other precaution taken for their protection.

3. Highways—Abandoned Way—Warning—Presumption as to Safety.

Where a highway containing a plain well-beaten track is discontinued, it is the duty of the public authority responsible therefor, to give such notice or warning, or erect such barriers as will prevent its use by travelers by night as well as by day, and in the absence of such notice travelers have the right to presume that such highway has not been discontinued or obstructed.

4. Highways—Injuries from Defects—Contributory Negligence.

A case in which the evidence of prior knowledge of the discontinuance of or defects in an old road, held not sufficient to show, as matter of law, contributory negligence of plaintiffs who were injured while traveling thereon in the night time.

[Headnotes by the Court.]

Error to the Circuit Court of Randolph County to review a judgment in favor of plaintiff rendered in an action brought to recover damages for personal injuries sustained while traveling on a public highway. Affirmed.

NOTE.

On the subject of Defects and Obstructions on Highway, see notes in 4 Am. Neg. Rep. 96, 268; 5 Am. Neg. Rep. 516; 6 Am. Neg. Rep. 84; 7 Am. Neg. Rep. 239, 356.

And on the subject of Accidents in Openings in Highways, see note in 11 Am. Neg. Rep. 27.

And on the subject of Defective Highways, see notes in 11 Am. Neg. Rep. 128, 332.

And on the subject of Liability of Municipal Corporations for Excavations and Openings in Streets and Sidewalks, see note in 9 Am. Neg. Rep. 552.

For plaintiff in error—H. G. Kump.

For defendants in error—Samuel T. Spears.

DECLARATION.

M. L. Daniels and Carrie Daniels complain of the County Court of Randolph County, a corporation existing under the laws of the State of West Virginia, of a plea of trespass on the case, for that, heretofore, to-wit, on the ---- day of -----, 1907, and within one year next before the bringing of this suit, there was a common and public road extending from the town of Beverly in said county along and over what is known as Files Creek, in said county and known as the Files Creek road, in said Randolph County, over which said public road all the citizens of this State, and all others, had the right to travel, pass and repass and without let or hindrance or obstruction; that before and at the time of the wrongs, grievances and injuries hereinafter mentioned, the said defendant had opened said road and controlled and treated it as a public road; that on the day and year last aforesaid, at the county aforesaid the said defendant wrongfully, injuriously and negligently allowed and permitted the said public road, at the place where it crosses said Files Creek, to be and become and to remain in bad order and out of repair, in this, to-wit, that the said defendant dug and excavated, and caused to be dug and excavated and allowed and permitted to be dug and excavated and washed by the waters of said Files Creek, a steep and perpendicular descent and fall of nearly six feet in depth in the said road, whereby and by means whereof, afterward, to-wit, on the day and year last aforesaid, at the said County, the said plaintiffs, together with their two children, then lawfully and in exercise of due care, driving a horse and buggy then owned by the said M. L. Daniels, which said buggy was occupied by said plaintiffs and children, upon, over and along the said public road, suddenly and without any warning or notice of any kind that the said public road was out of repair as aforesaid, it being then and there dark, the said horse stepped upon the said descent and fall and together with the said buggy and these plaintiffs and their said children were *precipitated* into and fell into said descent and fall, and said Carrie Daniels thereby and by reason thereof, sustained a severe shock and suffered painful internal injuries, and was permanently injured, and was lame, injured, sore, sick and disabled for a long space of time, to-wit, hitherto, and suffered great physical pain and mental anguish and lost much time, to-wit, hitherto, and incurred much expense in and about her endeavors to be cured of the said injuries, wherefore and by means of the prem-

ises and of the wrongs, grievances and injuries hereinbefore mentioned, the said plaintiffs hath sustained damages to the amount of \$5,000.00; that at the day and year last aforesaid, and at the time of the said wrongs, grievances and injuries hereinbefore mentioned, the said Carrie Daniels was, and still is the wife of the said M. L. Daniels; and plaintiffs hath heretofore made demand on said defendant that it repay and pay to them for said damages, injuries, etc., the amount of damages so sustained by these plaintiffs, but to pay the same or any part thereof the defendant hath heretofore and still doth refuse; and therefore plaintiffs sue, etc.

Second Count: And also for this: That heretofore, to-wit, on the day and year aforesaid, and within one year of the bringing of this suit, there was a common and public road extending from the town of Beverly in said county along and over what is known as Files Creek, in said county, and known as the Files Creek road, in said Randolph County, over which said public road all the citizens of this State and all others, had the right to travel, and pass and repass and without let or hindrance or obstruction; that before and at the time of the wrongs, grievances and injuries hereinbefore mentioned, the said defendant had opened the said road and controlled and treated it as a public road; that on the day and year last aforesaid, the said defendant wrongfully, injuriously and negligently allowed and permitted the said public road, at the place where it crosses said Files Creek, to be and become and remain in bad order and out of repair, in this, to-wit, that a short time prior to said last named date the waters of said Files Creek became very high and washed, excavated and dug away a large portion of said public road where the said road crosses said Files Creek, whereby and because of said washing of said road a steep and perpendicular descent and fall of nearly six feet in depth was made across the said road, thereby making said road impassable and exceedingly dangerous to any person attempting to use said road; thereupon and some time thereafter the surveyor of roads pretended to change the location of said public road where it crosses said Files Creek, and to abandon that portion of said public road where said descent and fall was, but the said surveyor of roads made no physical change upon the ground with respect to said public road, and gave no notice to defendant or the public in general that said pretended change had been made, but left the said public road where it crosses said Files Creek, and was washed, excavated and dug as aforesaid, open to the use of the public, and the said defendant permitted said public road to be dug, excavated and washed as aforesaid, and permitted and allowed said perpendicular descent and fall as aforesaid to remain in said portion of said public

road and neglected and failed to give any warning or notice of any kind or character that said pretended change had been made in said road, and neglected and failed to provide any guard, fence or warning of any kind or character, as it was its duty to do, to prevent persons who were rightfully using said road from going upon the said pretended abandoned portion of said road, whereby, and by means whereof afterward, to-wit, on the day and year last aforesaid, at the said county, the said plaintiffs together with their two children, then lawfully and in exercise of due care, driving a horse and buggy then owned by the said M. L. Daniels, which said buggy was occupied by said plaintiffs and their children, upon, over and along, the said public road, suddenly and without any warning or notice of any kind that the said public road was out of repair as aforesaid, it being then and there dark, the said horse stepped upon the said descent and fall and together with the said buggy and these plaintiffs and their children were *precipitated* into and fell into the said descent and fall, the said Carrie Daniels thereby and by reason thereof, sustained a severe shock, and suffered painful internal injuries, and was permanently injured, and was lame, injured, sore, sick and disabled for a long space of time, to-wit, hitherto, and suffered great physical pain and mental anguish, and lost much time, to-wit, hitherto, and incurred much expense in and about her endeavors to be cured of the said injuries, wherefore, and by means of the premises and of the wrongs, grievances and injuries hereinbefore mentioned, the said plaintiffs hath sustained damages to the amount of \$5,000.00; that at the day and year last aforesaid, and at the time of the said wrongs, grievances and injuries hereinbefore mentioned, the said Carrie Daniels was and still is the wife of the said M. L. Daniels; and plaintiffs hath heretofore made demand on said defendant that it repay and pay to them for said damages, injuries, etc., the amount of damages so sustained by these plaintiffs, but to pay the same or any part thereof the defendant hath heretofore and still doth refuse; and therefore plaintiffs sue, etc.

MILLER, J. Plaintiffs recovered against defendant, on the verdict of a jury, a judgment for \$304.50, damages for personal injuries alleged to have been sustained by Mrs. Daniels, while traveling with her husband over a public road. The correctness of that judgment is brought in question by the present writ of error.

The demurrer to the declaration, in two counts, we think was properly overruled. The action of the court thereon is assigned as error here, but does not seem to be seriously relied upon. The negligence of the defendant, alleged to have resulted in the injuries sustained by the

wife, is that it permitted the public road, known as the Files Creek road, at a place where it crosses Files Creek in said county, to become and remain out of repair; that at a short time prior to the date of her injuries very high waters in said Files Creek had washed, excavated and dug away a large portion of said road, where the same crossed said creek, producing a steep and perpendicular descent into said creek, rendering the road impassable, and exceedingly dangerous to persons using the same, particularly in the night time; that some time thereafter, and before Mrs. Daniels sustained her alleged injuries, the surveyor of said road pretended to change the location thereof where it crossed said creek and to abandon that portion of the old road where it crossed said creek, and where the washout occurred, but had left the old road washed, excavated, and dug out as aforesaid, open to the use of the public, and had neglected to erect any guard, fence or barrier, so as to give warning and notice that such pretended change had been made, as it is alleged it was his duty to do, whereby and by reason whereof, it is alleged, said plaintiffs, together with their two children, then lawfully on said road and in the exercise of due care, in the night time, suddenly and without any warning or notice of any kind that said public road was so out of repair, were precipitated over said descent and into said creek, whereby and by reason whereof the plaintiff Carrie Daniels sustained the injuries of which the plaintiffs complain.

The facts are few, and there is little, if any, material conflict in the evidence. The accident occurred on the night of August 31, 1907, about nine o'clock. The evidence is that the night was very dark. The plaintiffs were on their way from Beverly to the home of the father of M. L. Daniels, who lived on Files Creek, within some three hundred yards of the place of the accident. Plaintiffs lived at Elkins, and, so far as the record shows, they knew nothing of the condition of the road at this crossing. They had heard of high waters occurring about July 17th, and that the roads had been washed out in places, but did not know of the condition of this road, or that any portion of it had been abandoned and a new location made. The old road, the abandoned part, ran south from Beverly, in the direction in which plaintiffs were traveling, around the foot of a hill to the point where it crossed the creek. This new road was made by simply laying down the fence enclosing an adjoining meadow, removing some rocks in the way, and by making fills in one or two places. After it was opened, the evidence shows the public generally used the new way, the old one being abandoned because impassable, where it crossed the creek.

Defendant denies negligence, but the principal defense is contributory negligence on the part of the plaintiffs.

The evidence of the road surveyor, and of one or two other witnesses, tends to show that some rubbish washed in the road by the flood, and some brush and a pole put up across the abandoned way served as a barrier to travel on the abandoned way; but other witnesses, including the road surveyor of an adjoining section, who did the work of opening the new way, say there was no barrier or pole erected across the old way. The evidence makes it quite certain that on the night of the accident there was no pole there and no barrier or warning sufficient to obstruct the passage of the plaintiffs over the abandoned road. The evidence is that it was old and worn, and easily seen, while the new way could not be seen in the darkness, by persons traveling in vehicles.

The authorities seem to be quite uniform in holding that where an old and dangerous road or way is abandoned for a new one established, public authorities in charge of the work must put up barriers or warnings to protect travelers, acting upon the belief, justified by appearances, that the old way is still open, and that it is negligence not to do so. 2 Elliott on Roads & Streets (3d Ed.) § 801; *Bills v. Town of Kaukauna*, 94 Wis. 310, 68 N. W. 992, and cases cited; 37 Cyc. 291, and notes; 28 Cyc. 1403-1405, and cases cited in notes.

But were plaintiffs guilty of contributory negligence barring recovery? Contributory negligence when it depends on facts and testimony is a question for the jury. *Snoddy v. Huntington*, 37 W. Va. 111, 16 S. E. 442. Our decisions say, however, that where the facts and evidence show, as matter of law, that plaintiff was guilty of contributing to his injuries the court should, on motion of defendant, exclude all the evidence from the jury. *Slaughter v. Huntington*, 64 W. Va. 240, 241, 61 S. E. 155, 16 L. R. A. (N. S.) 459, and cases cited. The rule is also well settled in this and other States that a traveler on a public highway cannot close his eyes to open and patent defects and dangers. If plaintiffs had been traveling in the day time, with the new way and the dangers of the old plainly in sight, as the evidence shows they were, the authorities say they could not recover. Travelers on a highway must use their senses, and are not permitted to shut their eyes to open and obvious defects and dangers in the way. For injuries thus sustained, due to negligence on their part, damages for injuries sustained can not be recovered. *Hysell v. Central City*, 68 W. Va. 769, 70 S. E. 767, and cases cited.

What is the rule, however, where persons are using a public road in the night time? It is well stated, with copious citations, in 28 Cyc.

1431, as follows: "A person traveling on a street or public way in the night time is required to exercise such ordinary care and caution as a reasonably prudent man would exercise under the circumstances, and in view of the darkness; and ordinary care in the night time may call for greater caution than in the day time. In exercising ordinary care a traveler at night, in the absence of knowledge to the contrary, has the right to act on the assumption that the street or way is in a reasonably safe condition for travel by night as well as by day, and is not bound to anticipate that he will encounter excavations, without having some notice thereof by lights, or without other precautions taken for his protection. A failure to use prudence commensurate with obvious conditions constitutes negligence."

Tested by this rule can we say as matter of law that plaintiffs were guilty of negligence precluding recovery? Unless we can do so, the question then being one of mixed law and fact for jury determination, on proper instruction by the court, we should not disturb the verdict and judgment of the court below. As particularly pertinent to the case at bar, it was decided in Wisconsin, in *Bills v. Kaukauna*, *supra*, that, "Where a highway containing a plain and well-beaten track is discontinued, it is the duty of the town to give such notice or warning or erect such barriers as will prevent its use by travelers by night as well as by day; and in the absence of such notice travelers have a right to presume that such a highway has not been discontinued or obstructed."

To reverse the judgment below, defendant relies on the admissions of plaintiffs that on the night of the accident in question they knew that floods had prevailed in Files Creek and in other creeks, some two weeks previous, and that the roads had been washed in some places; and that before reaching the place of the accident, Mrs. Daniels had suggested to her husband that he had better walk ahead and see if there were any washouts, and to which he replied, that the roads had been used, that wagons had gone over it, and that it was all right. He proved, however, that he had no reason to believe this road, if damaged by the floods, had not been repaired in the meantime, or that it was unsafe. Mrs. Daniels' testimony is as follows: "Q. Now, Mrs. Daniels, it was dark when you left Beverly, or about so? A. Yes; it was getting dark I remember. Q. And you told your husband you thought it was dangerous to go, or he had better not go? A. I don't remember about that. Q. You said something before you got well started on the road? A. While we were on the road I mentioned to him perhaps that there was some danger. I don't remember whether it was after we were going up that road, or not. Q. And he still

thought it was merely a woman's weakness, and that you were afraid? A. He didn't pay any attention to me I know. Q. Now then you got up to the ford of Files Creek there? A. Yes. Q. This left-hand prong that comes down by the Beverly Road. Do you remember now whether you told him again that he had better get out and see if it was safe? A. No, I didn't say anything to him. He made the remark to me that there was the fence. He says it is all right. Here is the fence that goes along the road. Q. Then you were looking out for difficulties when you saw that? A. When we saw that we just drove on. Q. But you must have been looking for difficulties when he said, 'All right, there is the fence.' A. That is what he said. Q. But you were looking out for difficulties? A. I was uneasy, I admit, but I don't think he was. Q. He was very willing to take the risk. Now, Mrs. Daniels, how far was that below the ford that he remarked, 'there is the fence?' A. I don't remember. He says, 'There is the fence that goes around, and it is all right.' I don't know whether the fence is still there or not."

We do not think this evidence sufficient to show negligence on the part of the plaintiffs or either of them. True they had heard of high waters in the creeks, and Mrs. Daniels appears to have had some apprehensions that the road might be dangerous; but her husband, familiar with the road, and knowing that some two weeks had elapsed, after the high waters had subsided, and who appears to have been driving cautiously, had the right to assume, as the authorities hold, that if the road had been damaged, it had, in the meantime, been made reasonably safe for travel by night as well as in the day time; or if rendered dangerous, and any part of it had been abandoned for a new location, that some sign or warning would be given to protect travelers upon the road.

For the reasons given we are of opinion to affirm the judgment.

STREETER v. WESTERN WHEELED SCRAPER CO.

[SUPREME COURT OF ILLINOIS, JUNE 6, 1912.]

254 Ill. 244.

1. Master and Servant—Duty to Guard Machinery—Notice from Inspector.

The obligation imposed on an employer by Hurd's Rev. Stat., 1909, chap. 48, Sec. 1, to guard dangerous machinery, is absolute and not dependent upon any notice from the State inspector, as provided for in sections 23 and 25, which provide, in substance that, whenever, by the provisions of the statute it shall be the duty of any person to make any alterations or changes in machinery, the same shall be completed within a reasonable time after notification by the chief State factory inspector.

2. Master and Servant—Injury to Servant—Unguarded Knives—Sufficiency of Declaration.

A declaration in an action brought to recover damages for injuries sustained by an employee when his hand accidentally slipped into the knives of a jointer, described as a machine having whirling knives which cannot be so placed as not to be dangerous, and which alleges that such knives are unguarded, states a cause of action within Hurd's Rev. Stat., 1909, chap. 48, sec. 1, which requires that dangerous machinery shall be either guarded or so located as to remove the danger.

3. Master and Servant—Guarding Machinery—Evidence as to Practicability.

Evidence that it was practicable to guard a jointer having revolving knives, as required by statute, is shown by a witness who testified that he was a mechanical engineer and draughtsman, that he was familiar with the kind of jointer by which plaintiff was hurt and the manner of its operation, that such jointer was in use in the shop of the company by which he was employed, that a guard was used over the knives, and that such guard is a practical device.

4. Master and Servant—Assumption of Risk.

An employee assumes all the ordinary risks of his employment and extra-

CASE NOTE.**Voluntary Assumption of Risk by Servant as Defense to Master's Breach of Statutory Duty.**

- I. IN GENERAL, 828.
- II. DEFENSE AVAILABLE, 832.
- III. DEFENSE NOT AVAILABLE, 840.
 - A. IN GENERAL, 840.
 - B. SPECIAL STATUTORY PROVISIONS, 852.
- IV. VIOLATION OF ORDINANCES, 854.
- V. ATTEMPT TO COMPLY WITH STATUTE, 855.
- VI. FEDERAL DECISIONS, 856.
- VII. ENGLISH DECISIONS, 864.

I. In General.

The question whether the defense of assumption of risk by an employee who has notice of the master's breach of a statutory duty to guard a dangerous situation, is one on which the authorities are in conflict. At the present time the cases seem to be about equally divided on the proposition. The trend of modern legislation is, however, clearly in favor of the employee.

The statutes which have been passed in the different States are of widely varying character. Some merely im-

ordinary risks of which he has knowledge, and all obvious risks existing at the time of his employment or coming into existence subsequently.

5. Master and Servant—Guarding Machinery—Master's Violation of Statute—Assumption of Risk.

A servant who continues in his employment in a factory with knowledge of his master's violation of Hurd's Rev. Stat., 1909, chap. 48, sec. 1, which imposes upon employers the duty of guarding dangerous machinery, and with knowledge of the consequent danger to himself, does not assume the risk of injury from such violation.

Appeal by plaintiff, Milford E. Streeter, from a judgment of the Appellate Court, which affirmed a judgment of the trial court directing a verdict in favor of defendant, Western Wheeled Scraper Company, and against plaintiff, in an action brought to recover damages for injury to plaintiff's hand caused by contact with rapidly revolving knives which were not guarded as required by statute. *Reversed.*

For appellant—John M. Raymond, and John K. Newhall, (R. S. Egan, of counsel).

For appellee—J. C. Murphy, and E. L. Lyon.

DUNN, J. The appellant sued the appellee for damages on account

pose certain obligations upon the master, and are silent on the matter of assumption of risk; others, while also silent on that subject, declare that all contracts releasing the master from liability for injuries resulting from his noncompliance with statute shall be null and void; other statutes expressly declare that assumed risk shall not constitute a defense to an action by an employee injured by the master's breach of a statutory duty. These differences account, to a certain extent, for the lack of harmony among the decisions.

On the subject of employee's assumption of risk and master's breach of a statutory duty, Bailey on "Personal Injuries," vol. 2, § 359, says: "Employer's Liability Acts do not abolish the defense of assumed risk, except in one or two States, but in some States the statute expressly defines what risks are assumed. The

statutes in a few states provide that the servant's knowledge of the defects does not constitute an assumption of risk, but this provision is generally supplemented by one relieving the master from liability if he was ignorant thereof and the injured servant failed to impart his knowledge to the master or some superior servant. In other States, by statute, railroad companies cannot set up the defense of assumption of risk as to any defect in the machinery, ways or appliances of the company. And in some States a railway company is precluded by a provision in the Constitution from setting up the defense of assumed risk. Other statutes passed for the protection of employees expressly provide that the assumption of risk shall not be a defense in case of violation of certain statutory provisions. Thus, the Federal statute requiring the use of automatic couplings on railroad cars for-

of the loss of three fingers of his left hand. The court directed a verdict for the defendant and entered a judgment against the appellant, which the Appellate Court affirmed. A certificate of importance and an appeal to this court were granted.

The appellee operated a factory in which power-driven machinery was used, and employed the appellant to run a jointer—a machine used in shaping and planing wood, having knives, revolving at a speed of 2,600 revolutions a minute, extending along its surface and in plain sight at all times whether the machine was in operation or not.

bids the defense of assumed risk. So the Federal Employers' Liability Act of 1908 abolishes the rule of assumed risk where the master's violation of a statute has contributed to the servant's injury. In those States where the defense of fellow-servants has been abolished as to all employees or certain employees, an employee within the statute does not assume the risk of negligence of a co-employee. Under the Texas statute of 1905, relating to assumed risk, an employee of a railroad company does not, as a matter of law, assume the risk of a defect and danger which he knew of; but whether he does or not depends, where no notice of the defect is given, on whether his proceeding with the work is consistent with ordinary care. The courts are not agreed as to the effect of statutes imposing a duty upon the master, upon the doctrine of assumed risk by an employee. Some courts hold that in the absence of express terms abrogating that defense, it does not change the rules of law in respect to that subject, while others hold that the omission of such statutory duty precludes such a defense. Where not otherwise expressly provided by statute, assumed risk is a defense in such a case in Arkansas, Colorado, Kentucky, Maine, Massachusetts, Minnesota, Montana, New Jersey, New York, Ohio, Rhode Island, and Wisconsin. Assumed risk is not

a defense in Indiana, Iowa, Kansas, Louisiana, Michigan, Missouri, Oklahoma, Pennsylvania, Vermont, and Washington. In still other jurisdictions, assumed risk is no defense where the negligence relied on is the violation of a statute, where the violation is a wilful one. In Alabama, if it appears that the injuries which an employee sustained was the result of the wilful, wanton and reckless act of another employee, a plea of assumed risk is not available." A large number of cases are cited in support of the statements made by the author.

On the subject of the master's breach of a statutory obligation, Dresser on "Employers' Liability," § 116, says: "When a statute passed for the protection of a certain class of individuals imposes a duty as to them upon an employer of labor, the authorities are in conflict upon the question whether one of the class to be benefited who knows of a violation of this duty by his master may, by his conduct in reference to it, disentitle himself to recover for an injury. Several cases have held that the maxim, *volenti non fit injuria*, does not apply to the breach of a statutory obligation, but it is believed that these cases do not rest upon a sound principle. When a duty and a penalty for its violation are imposed by statute, the question whether a person injured by the breach of the obligation may re-

These knives were not covered or protected by a guard or device of any kind. On the second day of his work with the jointer, the plaintiff, while standing by its side, was bumped into by another workman, and in order to prevent himself from being thrown into the unprotected moving belt which operated it, he caught with his left hand the gauge on top of the jointer. His hand, being wet with perspiration, slipped from the gauge into the knives, and three of his fingers were cut off. The appellant contends that appellee was required to inclose or protect the knives of the jointer by "an Act to provide for the

cover depends upon the terms and purpose of the enactment. If the statute is passed for the benefit and protection of the public at large, the general rule is that a private action will not lie, and the only remedy is an exaction of the penalty prescribed by the Act. If, however, the statute is for the benefit of a class of individuals, the better opinion is that a private action will lie, although the statute by terms affixes a penalty on its violation. Of this latter class of Acts are those regulating the employment of women and children, the inspection and protection of buildings and machinery, and the conduct of dangerous occupations. The statute may create a new duty, or it may affix a penalty to a duty which was, previous to its passage, recognized at common law. When an action is brought under the statute, proof of the violation of it makes out the plaintiff's case, and if the action is brought for the breach of a common-law duty, evidence of the violation of the statute is *prima facie*, and in some jurisdictions conclusive, evidence of negligence. In determining whether the maxim, *volenti non fit injuria*, applies to a breach of statutory obligation, the distinction heretofore made between dangers existing at the time of the employment and dangers subsequently arising may be disregarded. Where no question of statutory duty

enters, it was seen that an occupier of premises owes no duty to the public in regard to their condition, but that if he invites people to enter upon them, he becomes bound not to lead them into danger, and consequently the duty arises, by virtue of this invitation, to protect and warn his visitors against all dangers known to the occupier and not to them. As to the dangers known to them, the visitors take the premises as they find them, and the act of accepting employment is, as a matter of law, a voluntary assumption of the risks. It was also seen that after the employment is accepted, and the mutual duties and disabilities established, the master may only escape the consequences of a violation of his obligations by a voluntary consent on the part of the servant to waive the breach and undertake the risk. The act of the servant in one case does away with the duty, and in the other does away with the consequences of its breach. But the Legislature may, for example, say that every employer shall be bound to keep his machinery guarded, or not to employ children, and in such case it may create a new duty or impose a penalty for what might in some cases be a common-law duty. Such a duty is owed, not only to the persons then employed, but to all who may become servants. A servant who goes to work in a factory where the statute is dis-

health, safety and comfort of employees in factories, mercantile establishments, mills and workshops in this State, and to provide for the enforcement thereof" (Hurd's Stat. 1909, p. 1102). The appellant knew that the jointer was a dangerous machine, that the knives were revolving rapidly and were unguarded, and that his fingers would be cut off if he got them in the machine.

Some of the counts of the declaration charge the appellee with negligence, without regard to the statute, either in failing to furnish the appellant a reasonably safe machine with which or a reasonably safe

regarded goes to work under a master who has already committed a breach of duty towards the public and towards him, and this breach is committed whether the danger arising from it be known or unknown to the servant. When the servant knows and appreciates the danger, it is clear that he would have waived the breach upon the entrance into the employment, had there been a common-law duty, and the question is whether the fact that the duty is statutory, subjecting the master both to penalty and action, changes the rule. If it does not, the plaintiff may waive this breach of duty, as he may waive a breach of a common-law duty, by a voluntary consent to undertake the risk. * * * The true rule is believed to be that a servant, upon entering the employment or afterwards, may expect that the master will comply with the statute; but if the master does not so comply, and the servant knows the breach and his rights under it and appreciates the risk therefrom, he cannot recover in any case where it appears that he consented to the violation. The maxim, *volenti non fit injuria*, should apply to such a case, but the questions of fact upon which it is founded should be determined by the court only when the inferences are conclusive."

II. Defense Available.

In the following cases the defense

of assumed risk is held to be available to a master who has violated a statutory obligation:

Colorado. A statute (Colo. Sess. Laws 1897, chap. 69, p. 258), requiring the blocking of railroad switches and making a failure to do so *prima facie* evidence of negligence in case an employee is injured by the absence of such a block, was construed in *Denver & R. G. R. Co. v. Gannon*, 40 Colo. 195, 90 Pac. 853, 11 L. R. A. (N. S.) 216 (1907), as not taking away the defense of assumption of risk. This statute confers no new right upon an employee, but makes the failure to do certain acts *prima facie* evidence that the company has neglected a duty that was always imposed upon it by the common law. In its opinion the court quoted at length from *Dresser* on "Employers' Liability," § 82.

Massachusetts. In Massachusetts the doctrine is recognized that a servant may assume the risk of a master's failure to perform a statutory duty for the former's protection. Thus, in *Marshall v. Norcross*, 191 Mass. 568 (1906), where it appeared that a master had neglected to place flooring in a building in the process of construction, as required by Mass. Stat. 1901, chap. 166, and a workman was injured in consequence thereof by the fall of an angle iron upon him while he was at work, it was held that, as the servant knew of the danger, he

place in which to work. It will be unnecessary to consider these counts, for it may be conceded that but for the statute the appellant would be held to have assumed the risk of the unprotected knives and therefore to be barred of a recovery on those counts, and yet, if the other elements of a recovery were present, he would be entitled to have the cause submitted to the jury on the counts charging a violation of the statute requiring the machine to be protected, unless the appellant can be held to have assumed also the risk incident to such violation of the statute.

assumed the risk of injury arising from non-compliance with the statute.

Speaking with reference to the doctrine announced in the Marshall case, the court in *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 15 Am. Neg. Cas. 583, 47 L. R. A. 161 (1893), said: "The doctrine of the assumption of the risk of his employment by an employee has usually been considered from the point of view of a contract, express or implied; but, as applied to actions of tort for negligence against the employer, it leads up to the broader principle expressed by the maxim, *volenti non fit injuria*. One who knowingly and, appreciating a danger, voluntarily assumes the risk of it, has just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. * * * The statute does not attempt to take away the right of the parties to make such contracts as they choose, which will establish their respective rights and duties. * * * It would be an unwarranted construction of the statute, which would tend to defeat its object, to hold that laborers are no longer permitted to contract to take the risk of working

where there are peculiar dangers from the arrangement of the place, and from the kind or quality of machinery used. Nothing but the plainest expression of intention on the part of the Legislature would warrant giving the statute such an interpretation."

Risk of injury is assumed by a young man, 19 years of age, caused by falling into an elevator well by the slipping of a bar placed lengthwise across the opening when he placed his hand thereon for support, when he raised his foot to examine his shoe from which the heel had just been torn, notwithstanding a statute. (*Mass. R. L. chap. 104, sec. 43*), which requires elevator wells to be guarded by "sufficient automatic rails or gates." *Simoneau v. Rice & Hutchins*, 202 Mass. 82, 21 Am. Neg. Rep. 242 (1909).

Minnesota. In Minnesota it has been held that Gen. Stat., § 2248, which requires employers properly to protect and guard cogwheels in a practicable manner, does not change the common-law rule as to assumption of risk by an employee. *Anderson v. C. N. Nelson Lumber Co.*, 67 Minn. 79, 16 Am. Neg. Cas. 178 (1896); *Swenson v. Osgood & Blodgett Mfg. Co.*, 91 Minn. 509, 17 Am. Neg. Rep. 167 (1904). The *Anderson* case was followed in *Seely v. Tennant*, 104 Minn. 354 (1908).

And in *Fleming v. St. Paul & D. R.*

It is first contended in support of the judgment that the Act imposed no obligation on the appellee until after notification by the factory inspector. Sections 1 and 23 of the Act are as follows:

"Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That all power-driven machinery, including all saws, planers, wood-shapers, jointers, sandpaper machines, iron mangles, emery wheels, ovens, furnaces, forges and rollers of metal; all projecting set screws on moving parts; all drums, cogs, gearing, belting, shafting, tables, flywheels, flying shuttles and hydro-

Co., 27 Minn. 111, 16 Am. Neg. Cas. 286 (1880), it was held that the doctrine of assumption of risk was available as a defense in an action brought to recover damages for the death of a railroad fireman, who was killed by the derailment of a train caused by running over a cow which had escaped upon the track, due to the failure of the company to perform a statutory duty to build proper cattle-guards and fences along its right of way.

Mississippi. The provisions of a Mississippi statute (Code 1906, sec. 4056), that "knowledge by an employee injured by the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them," leave the matter of assumption of risk as it stood at common law; therefore, an engineer who was injured by the defective condition of the glass tube in the lubricator in an engine voluntarily operated by him with knowledge of the defect, occupies the same position as though no statute had been adopted, and cannot recover for injuries so sustained, on the ground of assumption of risk. *Yazoo & W. V. R. Co. v. Woodruff*, 98 Miss. 36 (1910).

Montana. In a Montana case it has been held that the defense of as-

sumption of risk has for its basis the common-law principle expressed in the maxim "*volenti non fit injuria*," and does not rest in contract between master and servant; therefore, the defense of assumption of risk by a servant was not abrogated by Constitution, Art. XV, sect. 16, and Revised Code, secs. 5052 and 5053, which provide that a contract releasing an employer from liability for his negligence is void. The court also held that the failure of a mining company to equip its cages with doors or safety gates as required by Revised Codes, sect. 8536, which imposes a penalty for non-compliance, did not deprive the company of the right to interpose the defense of assumption of risk or contributory negligence. The court said: "We are of the opinion that the defense of assumption of risk is still generally available in this State in an action between servant and master. But it is urged by the respondent that it is not available when the injury to the servant is occasioned by failure of the master to observe a duty imposed by statute. The argument advanced is that by implication the "safety-cage" statute repeals the common-law rule and takes away that defense. * * * It must be borne in mind that the statute is penal in character. It relates exclusively to the duty of equipping cages in a certain manner, and the penalty for failure of compliance fixed in

extractors; all laundry machinery, mill gearing and machinery of every description; all systems of electrical wiring or transmission; all dynamos and other electrical apparatus and appliances; all vats or pans, and all receptacles containing molten metal or hot or corrosive fluids in any factory, mercantile establishment, mill or workshop, shall be so located wherever possible, as not to be dangerous to employees or shall be properly enclosed, fenced or otherwise protected. All dangerous places in or about mercantile establishments, factories, mills or workshops, near to which any employee is obliged to pass, or to be

the law itself. If the Legislature had in mind any other penalty, it might easily have said so; and the fact that it did not, furnishes a presumption that it had no such intention. There is not anything in the statute relating to the defense of assumption of risk. Indeed, there is no word relating in the remotest degree, either directly or indirectly, to any action for personal injuries by the servant against the master. There is nothing to indicate that the law-making body had any other thought than that the employer should be compelled, by fear of criminal prosecution, to provide for the employee certain safety appliances, which experience had taught, should be furnished in any event. The court are almost unanimously agreed that a failure to comply with the law constitutes negligence *per se*, but the sole effect is to remove the question of primary negligence from the realm of uncertainty. * * * There is to our minds no force in the argument found in some of the decided cases, that the Legislature intended to abrogate the defense of assumption of risk as an additional punishment for failure to comply with the statute. * * * The penalty imposed by statute is not to be augmented by implication." *Osterholm v. Boston & M. Consol. Copper & S. Min. Co.*, 40 Mont. 508, 107 Pac. 499 (1909). The decision in this case was followed in *Monson v. La France*

Copper Co., 43 Mont. 65, 114 Pac. 778 (1911).

New Jersey. And in New Jersey it was held that sec. 13 of the Act of 1904, which provides that whenever practicable all machinery shall be properly guarded, and imposing a penalty for violation, does not abolish the common-law doctrine of assumption of risk. In this case it appeared that a servant's hand was caught between two cylinders of a calender machine used in a cloth factory, while he was trying to straighten out the cloth and prevent a double edge from going through. This seems to be the first case which has come before the courts of New Jersey on the question of the availability of the defense of assumption of risk by a master who has failed to comply with some statutory requirement. The court declared itself in favor of the doctrine as established in Maine, Rhode Island, Minnesota, Ohio, Wisconsin and New York, and followed the doctrine as laid down in *Knisley v. Pratt*, 148 N. Y. 372, 32 L. R. A. 369 (1896). The court called attention to the fact that the statute did not expressly exclude the defense of assumption of risk and makes no reference to any civil liability. *Mika v. Passaic Print Works*, 76 N. J. L. 561 (1908).

New York. Under secs. 18 and 19 of the New York Labor Law, which state, in substance, that one employ-

employed shall, where practicable, be properly enclosed, fenced or otherwise guarded. No machine in any factory, mercantile establishment, mill or workshop, shall be used when the same is known to be dangerously defective, and no repairs shall be made to the active mechanism or operative part of any machine when the machine is in motion."

"Section 23. Whenever, by the provisions of this Act, it is made the duty of any person, firm or corporation within this State, to make or install any alterations, additions or changes, the same shall be made

ing another to perform labor shall not furnish or erect for the performance of such work any scaffolding, hoists, stays, or ladders, which are unsafe, unsuitable, or improper and which are not so constructed as to give proper protection to human life or limb, and further providing that all swinging or stationary scaffolding shall be so constructed as to bear four times the maximum weight required,—an employer is left free to invoke the defense of assumption of risk or contributory negligence on the part of the servant injured. The court declared that the statute, "in its effect, provides that any employer who either personally or by another, furnishes for the performance of any named labor a forbidden article shall be responsible therefor. The duty of the employer created by it is personal, incapable of delegation and unaffected by caution and discrimination in selecting employees for their prudence—competency. * * * The common-law principles, in so far as they do not approve the provisions of the statute, remain and must be applied. * * * Although it imposes upon the employers personal responsibility and a positive prohibition, it does not, in terms impose absolute and irresistible liability from their default or disobedience; nor is the liability consequent upon the negligent violation of a duty created by a statute necessarily su-

perior to the relevant common-law defenses thereto. The employer is precluded from those defenses when the language of the statute evinces that the legislature thus intended, and not otherwise." *Gombert v. McKay*, 201 N. Y. 27 (1911).

In an action to recover damages for personal injuries sustained by a servant who fell through an elevator opening in a platform in a factory which was not guarded, as required by a city ordinance, it was held in *Burns v. Nichols Chemical Co.*, 65 App. Div. 424, 19 Am. Neg. Rep. 191, 192, 72 N. Y. Supp. 919 (1901), to be error for the court to instruct the jury that the plaintiff did not assume the obvious risks of his employment until the defendant had performed all of the duties that the law imposed upon it, and that, as it was the defendant's duty to put up guard rails, the plaintiff did not assume the risk of their absence until the defendant had performed such duty. "There is a clear distinction," said the court, "between risks of service and obvious risks."

The doctrine applied in the *Burns* case was previously applied in the case of *Knisley v. Pratt*, 148 N. Y. 372, 32 L. R. A. 369 (1896), in which it appeared that a servant was injured while cleaning a machine in motion by reason of his hand being caught between cogwheels left unguarded contrary to the provisions of the Factory

and installed in conformity with the provisions of this Act, and completed within a reasonable time after notification by the chief State factory inspector or his deputy."

Section 25 makes it the duty of the chief State factory inspector and his assistant and deputies to enforce the provisions of the Act, and section 26 imposes penalties for their violation.

Section 1 is an unqualified declaration that all machinery and appliances of the character mentioned shall be so located, wherever possible, as not to be dangerous to employees, or shall be properly inclosed,

Act. The court said: "The defendants are chargeable, therefore, with one omission only under the statute, viz., a failure to properly guard the cog-wheels of the punching machine. In order to sustain the judgment in favor of plaintiff it is necessary to hold that where the statute imposes a duty upon the employer, the performance of which will afford greater protection to the employees, it is not possible for the latter to waive the protection of the statute under the common-law doctrine of obvious risks. We regard this as a new and startling doctrine calculated to establish a measure of liability unknown to the common-law, and which is contrary to the decisions of Massachusetts and England under similar statutes. It should be remarked at the outset that the Factory Act in this State does not, in terms, give a cause of action to one suffering an injury by reason of the failure of the employer to discharge his duty thereunder. An action for such injury is the ordinary common-law action for negligence and subject to the rule of the common law. (*Caswell v. Worth*, 5 Ell. & B., 855). The principle contended for seems to rest, if it can be maintained at all, upon a question of public policy. The Factory Act, it is said, is passed to regulate the employment of women and children and imposes upon the employer certain duties and subjects him to specified penalties in case of default;

that a sound public policy requires the rigid enforcement of this Act, and it would contravene that policy to permit an employee by implied contract or promise to waive the protection of the statute. We think this proposition is essentially unsound and proceeds upon theories that cannot be maintained. It is difficult to perceive any difference in the quality and character of a cause of action whether it has its origin in the ancient principles of the common law, in the formulated rules of modern decisions, or in the declared will of the Legislature. Public policy in each case requires its rigid enforcement, and it was never urged in the common-law action for negligence that the rule requiring the employee to assume the obvious risks of the business was in contravention of that policy. It is possible that the statute imposes upon the employer duties under which he did not rest at common law. It may be asked, if the doctrine of obvious risks is applied to the statute, under what circumstances could the employee sue? It is well settled that the risks of the service a servant assumes in entering the employment of a master are those only which occur after the due performance by the employer of those duties which the law enjoins upon him. (*Benzing v. Steinway*, 101 N. Y. 547, 552; *McGovern v. Central Vermont R. Co.*, 123 N. Y. 280). The rule as to the risks of the service, or ordinary risks,

fenced, or otherwise protected. The duty is absolute and not dependent upon any notice from the inspector. *Arms v. Ayer*, 192 Ill. 601, 61 N. E. 851, 58 L. R. A. 277, 85 Am. St. Rep. 357. In that case the statute (Laws 1897, p. 222) required the erection of fire escapes on certain buildings. Section 3 required the factory inspector to serve notice for the erection of such fire escapes upon buildings not provided with fire escapes, in accordance with the Act, and section 4 provided that an owner not complying with such notice within 30 days should be fined. It was held that the duty to provide fire escapes was

is entirely distinct from the rule of obvious risks, and if the statute has added to the duties which the law enjoins upon the employer before the servant can be subjected to the rule of ordinary risks, then the default of the employer in the discharge of his statutory duty, resulting in injury to the employee, would enable the latter to sue. Such a construction of the statute would not in any way limit the doctrine of obvious risks. * * *

We are of opinion that there is no reason in principle or authority why an employee should not be allowed to assume the obvious risks of the business as well under the Factory Act as otherwise. There is no rule of public policy which prevents an employee from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks. The statute does indeed contemplate the protection of a certain class of laborers, but it does not deprive them of their free agency and the right to manage their own affairs." The doctrine laid down in the *Knisley Case*, was held in *Bushtis v. Catskill Cement Co.*, 128 App. Div. 780, 113 N. Y. Supp. 294 (1908), not to be affected by an amendment to the Factory Act making a failure to comply with its provisions a crime.

In *Rossiter v. Peter Cooper's Glue*

Factory, 149 App. Div. 752, 134 N. Y. Supp. 162 (1912), it was held that a servant who knew that boiling vats in a glue factory were not guarded as required by the Labor Law, sec. 81, and understood the dangers incident to the absence of guard rails, waived the benefits of the statute and assumed the risk of injury of working without a guard. The court said: "He (the servant) must be presumed to have known that the law required these guard rails; that he had a right to have them for his own protection, yet, with his attention called to the matter particularly, he elected to go to work without the railing, and by this he must be assumed to have waived the benefits of the statute, and to have assumed the risk incident to the open and obvious dangers of the situation. That a party may waive a rule of law, or statute, or even a constitutional provision, enacted for his benefit or protection, where it is exclusively a matter of private right, and no consideration of public morals are involved, and having once done so he cannot subsequently invoke its protection, is too well settled to be questioned. The requirements of this statute for a railing in position is in addition to the common law duties of the master; but the servant has a perfect right, in the full knowledge of the law and facts, to waive this additional protection."

It has also been held in New York that while there is a presumption that

not dependent upon the performance of any duty by the inspector. *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Rose v. King*, 49 Ohio St. 213, 30 N. E. 267, 15 L. R. A. 160.

It is next insisted that the statute requires the machinery mentioned in section 1 to be so located as not to be dangerous to employees, or to be properly inclosed, fenced, or otherwise protected, while the allegation and proof are only that the jointer was not protected, without showing that it was so located as to be dangerous to

a servant did not assume the risk of injury from the knives of a joiner which the master did not provide with a guard, as required by sect. 81 of the Labor Law, as amended in 1904, yet that presumption is not conclusive. In this instance it was held that the risk was not assumed. *Graves v. Gustave Stickley Co.*, 125 App. Div. 132, 109 N. Y. Supp. 256 (1908), affirmed without opinion in 195 N. Y. 584.

The presumption mentioned in the preceding paragraph, was held in *Ostermann v. Ware*, 135 App. Div. 119, 119 N. Y. Supp. 981 (1909), to be overcome by proof showing that the servant injured by a circular saw which the master had left unguarded, contrary to the provisions of sec. 81 of the Labor Law, had at various times for a period of twelve years operated such a saw without making any complaint as to the absence of guards.

In *Match v. Polygraph Printing Co.*, 147 App. Div. 152, 132 N. Y. Supp. 148 (1911), it was held that a boy engaged in operating a printing press did not assume the risk of injury arising from the failure of the master to guard the gearing of the press, as required by section 81 of the Labor Law, where it appeared that he was injured by his hand coming into contact with the uncovered gears of the press when he slipped on an oily spot in the floor, while on his way past the presses to receive orders from the foreman. The

court refused to follow the doctrine laid down in *Knisley v. Pratt*, 148 N. Y. 372, 32 L. R. A. 367 (1896), but regarded the case of *Martin v. Walker & Williams Mfg. Co.*, 198 N. Y. 324 (1910), as controlling.

Where a master is required to give his servant a safe scaffold by a provision of the Labor Law, it has been held that the servant did not assume the risk of injury by reason of a defective scaffold, under the rule that a servant only assumes such risks as occur after due performance by the employer of the duties enjoined on him by law. *Anderson v. Milliken Bros.*, 123 App. Div. 614, 108 N. Y. Supp. 61 (1908), affirmed without opinion in 194 N. Y. 521.

And in *Larsen v. Lackawanna Steel Co.*, 146 App. Div. 238, 130 N. Y. Supp. 887 (1911), it was held that an unguarded set screw on a revolving shaft which caught and injured a workman while upon a platform attempting to ascertain the cause of a belt running off the pulley on the shaft, is such a defect as to come within the provisions of the Employers' Liability Act (Consol. Laws 1909, c. 31), relating to assumption of risk, where proper notice has been served as required by the statute.

Other New York cases which hold that the risk of a master's breach of a duty imposed by the Labor Act is assumed by the servant, are as follows: *Fitzgerald v. Elsas Paper Co.*,

employees. One count, at least, of the declaration described the machine and its whirling knives, so that it was manifest that it could not be so located as not to be dangerous to the employees who were working with it. It was not necessary to use exactly that language, but it was enough to show that the machinery was dangerous to employees and was not protected.

It is urged that the proof does not sustain the allegation that it is practicable to guard the jointer, and to operate it, while so guarded as to be reasonably safe for employees. A witness who was a me-

30 Misc. 438, 62 N. Y. Supp. 597 (1900); *Shields v. Robins*, 3 App. Div. 582, 585, 38 N. Y. Supp. 214 (1896); *Graves v. Brewer*, 4 App. Div. 327, 38 N. Y. Supp. 566 (1896); *DeYoung v. Irving*, 5 App. Div. 499, 504, 38 N. Y. Supp. 1089 (1896); *Monzi v. Fredline*, 33 App. Div. 217, 219, 53 N. Y. Supp. 482 (1898); *Johansen v. Eastmans Co.*, 44 App. Div. 270, 272, 60 N. Y. Supp. 708 (1899), affirmed without opinion in 168 N. Y. 648; *Thompson v. Cary Mfg. Co.*, 62 App. Div. 279, 282, 70 N. Y. Supp. 1086 (1901); *Mull v. Curtice Bros. Co.*, 74 App. Div. 561, 563, 77 N. Y. Supp. 813 (1902); *Wingert v. Krakauer*, 76 App. Div. 34, 78 N. Y. Supp. 664 (1902); *McCarthy v. Emerson*, 77 App. Div. 562, 565, 79 N. Y. Supp. 180 (1902); *Sitts v. Waiontha Knitting Co.*, 94 App. Div. 38, 87 N. Y. Supp. 911 (1904); *Stevens v. Gair*, 109 App. Div. 621, 90 N. Y. Supp. 303 (1905); *Jenks v. Thompson*, 179 N. Y. 20, 26, 16 Am. Neg. Rep. 528 (1904), affirming 83 App. Div. 343, 82 N. Y. Supp. 274.

Rhode Island. The Supreme Court of Rhode Island, in *Langlois v. Dunn Worsted Mills*, 25 R. I. 645, 649, 16 Am. Neg. Rep. 161 (1904) said: "The question whether a plaintiff can recover for a breach of statutory duty, notwithstanding an assumption of risk or contributory negligence on his part, is one on which there is some difference of opinion, but we think the clear weight of reason and authority

is against such recovery. A statutory duty is no more imperative in law than a common law duty. A penalty may be imposed upon the offender for a breach of statute, but it does not change the relations between the parties, except to the extent that one entering the employ of another may assume, in absence of knowledge, that the terms of the statute have been complied with. * * * It is also well settled that a court will not presume that a statute is intended to change a rule of common law unless such an intent appears. * * * For example, ever since the advent of railroads, statutes have required the sounding of bell or whistle in approaching a highway crossing. Yet, though the statute should be negligently disregarded, it has never been held that a plaintiff seeing the approach of a train and injured while attempting to cross ahead of it, could recover. He would be held to have assumed the risk of so crossing, or to have been guilty of contributory negligence. The mere fact that the railroad company had violated the statute would not warrant a recovery." But see *Baynes v. Billings*, 30 R. I. 53, 21 Am. Neg. Rep. 239 (1909), III, B.

III. Defense not Available.

A. In General.

Alabama. In the absence of a special agreement based on a sufficient consideration, it was held in *Pratt Consol.*

chanical engineer and draughtsman testified that he was familiar with the kind of jointer by which the appellant was hurt and the manner of its operation; that such a jointer was in use in the shop of the company by which he was employed; that a guard was used over the knives; and that such guard is a practical device. This evidence tended to prove the practicability of a guard for the jointer.

The serious question in the case is whether the appellant assumed the risk incident to the appellee's violation of the statute. Stated generally, the question is: Does a servant who continues in the master's

Coal Co. v. Davidson, (Ala.), 55 So. 886 (1911), that a workman employed in a mine does not assume the risk of the operator's failure to comply with the provisions of Ala. Code, 1907, sec. 1016, which requires the maintenance of ample means of ventilation in mines for the circulation of air through all working places, so as to render harmless noxious gases generated therein.

But, the benefits of the Alabama Employer's Liability Act (Ala. Code 1907, sect. 3910, subdiv. 1), authorizing a recovery for an injury to a servant caused by any defect in the ways, works, machinery or plant, are not available to a servant who has been intrusted with the duty of seeing that a cotton gin is in proper condition, since in such a case he assumes the risk of injury incident to the operation of the gin when in a defective condition. *Maddox v. Chilton Warehouse & Mfg. Co.*, 171 Ala. 216, 55 So. 93 (1911). In this case it was a part of the servant's duty to remedy the defect.

Arkansas. By continuing to follow his employment after the master has refused to comply with the requirements of statute (Kirby's Dig. Ark. secs. 5350, 5352), to provide necessary props to make safe the room in which he is compelled to work, a miner does not assume the risk of injury which may result from such breach of duty. *Johnson v. Mammoth Vein Coal Co.*, 88 Ark.

243, 19 L. R. A. (N. S.) 646 (1908).

District of Columbia. In *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. D. C. 123 (1910), the provision of a statute that "no contract of employment shall constitute any bar or defense," was held to abrogate the defense of assumed risk, on the theory that the doctrine of assumed risk results from the contractual relation between master and servant.

Georgia. Under the Act of Congress prescribing the liability of carriers by railroad for injuries to their employees, a servant may assume the risk of injury as in other employments, except as to such acts as are violative of statutes enacted for the securing of the servant's safety. *Bowers v. Southern R. Co.*, 10 Ga. App. 367 (1912).

Indiana. In *Island Coal Co. v. Swaggerty*, 159 Ind. 664, 13 Am. Neg. Rep. 267 (1902), the court held a mine owner liable to a workman who was injured because of the former's failure to provide the statutory signals for raising and lowering an elevator in a mine. "The doctrine of assumption of risk," said the court, "does not apply to a case where the injury occurs by reason of the negligent nonobservance of a positive fixed duty enjoined by a statute."

One employed as a driver in a coal mine did not assume the risk of injury by falling slate, from the failure of the mine boss to see that all loose slate, coal and rock overhead in mines

employ with full knowledge of the violation by the master of a statute passed for the protection of the servant in his work, and of the consequent danger to himself, assume the risk of injury from such violation? There is a hopeless conflict in the answers to this question given by the courts of the various jurisdictions in the United States. The Legislatures of the various States of the Union, as well as Congress, have enacted a great variety of laws intended for the protection of persons working in mills and factories, operating or working with or about railroad trains, cars, locomotives, or other machinery, or

where employees have to travel to and from work shall be taken down or carefully secured, as required by sect. 8580, Burns 1908. It was contended by counsel that the doctrine of assumed risk was applicable, since the statute enjoins no specific act upon the mine boss, but leaves him free to exercise his judgment as to whether the loose coal should be taken down or secured. "We do not concur in this view," said the court, "the statute is explicit and mandatory. Take down or secure, and the alternative expression, does not create any uncertainty." *Princeton Coal Min. Co. v. Howell*, 46 Ind. App. 572 (1910). A similar decision was rendered in *Antioch Coal Co. v. Rocky*, 169 Ind. 247 (1907).

It will be noticed that some of the leading cases emphasize a distinction between statutory regulations which are stated in general terms and which are little more than re-enactments of the common-law rule, and those which prescribe specific means or methods for the protection of servants, and declare that assumption of risk is no defense to a violation of the latter statutes, but is available as a defense to the former. *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149, 12 Am. Neg. Rep. 381, 58 L. R. A. 944 (1902); *Whiteley Malleable Castings Co. v. Wishon*, 42 Ind. App. 288 (1908); *Cleveland, C. C. & St. L. R. Co. v. Bossert*, 44 Ind. App. 245 (1909).

In *American Rolling Mill Co. v. Hul-*

linger, 161 Ind. 673 (1903), the court said: "The rule concerning assumed risk is different in cases arising under the Employers' Liability Act, where definite duties are not prescribed, than what it is where a statute points out definitely what the master must do under certain cases to guard the safety of the employee."

The same distinction was noted in *Cleveland, C. C. & St. L. R. Co. v. Powers*, 173 Ind. 105 (1909), in which the court said that "we have a distinct line of cases in this State, as applied to master and servant, holding that, where a statutory duty is disregarded by the master, it is not necessary that the complaint allege that the servant was ignorant of the master's failure to comply with such statute, nor allege facts showing that he did not assume the risk." In this case the court held that, in an action by a servant to recover damages for injuries caused by being struck by a rapidly moving passenger train while he was on his way through the master's railroad yards to report for duty as required by the rules of the master, it was not necessary for the servant to negative in the complaint his knowledge of the master's violation of a city ordinance in the operation of its train, or to allege facts showing that the servant did not assume the risk of injury.

Iowa. The plea of assumption of risk will not be available to a master

working in places or under conditions which, unless special provision is made for their protection, expose them to risks to which they ought not to be subjected. Some of these, as the Railway Safety Appliance Act in Illinois (Hurd's Rev. St. 1909, c. 114, § 231) and the Act of Congress (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) on the same subject, expressly provide that an employee shall not be deemed to have assumed the risk because of continuing in his employment, or in the performance of the duties of such employment, after knowledge of the violation of the Act. Others declare that

where the negligent act charged was a violation of an express and specific statutory regulation. Thus, in *Poli v. Numa Block Coal Co.*, 149 Iowa, 104 (1910), it was held that a miner's use of a cage which was provided with a cover too small to protect those using the same from falling lumps of coal, is no defense to the master who has failed to comply with Iowa Code, sec. 2489, which requires those who operate mines to provide "proper covers overhead on all cages." It was contended in this case that plaintiff should be held as matter of law to have assumed the risk because the danger therefrom was obvious and that he was familiar with the conditions, and *Sutton v. Des Moines Bakery Co.*, 135 Iowa, 390 (1907), was cited to support the claim. Speaking in this connection, the court in the *Poli* case said: "It is to be conceded that in the opinion referred to (*Sutton Case*) an expression is used to the effect that, if there was a breach of statutory duty by the employer with reference to a safety device, plaintiff was nevertheless not absolved from the consequences of his voluntary assumption of the risk. The case was one in which the plaintiff's contributory negligence was so obvious that the court was united in the opinion that the order of the district court in directing a verdict for defendant should be affirmed. In disposing of the appeal, the opinion went somewhat beyond the last ground here men-

tioned, and made use of the language on which appellant now relies, without any general discussion of the question as to the effect of statutory regulation upon the application of the rule of assumption of risk. * * * Statutory regulation of the manner in which any particular line of business shall be carried on is an exercise of the police power of the State, and is intended in some instances as an instrument of protection to the public generally, and in others as a protection to certain classes of employees exposed to certain hazards. * * * To say that the Legislature in enacting these measures of protection, which in some degree equalize the advantages of employer and employee and afford a needed protection to the persons and lives of the latter, intended that a master might violate the statute to the injury or death of his servant, and then escape liability by pleading and proving that his offense against the law was habitual, obstinate and notorious, is inconsistent with justice, and it is hardly extravagant to say, repugnant to good morals. Such a rule offers a premium to contemptuous disregard of the statute, and robs it substantially of all value to the class in whose interest it was enacted." This quotation from the opinion in the *Poli* case, it will be noticed, either overrules or explains away the doctrine announced in the *Sutton Case*.

"We have already held," said the

no contract of employment shall constitute a defense to any action for an injury caused by a violation of the Act, or contain provisions of a similar nature. In still others, as in the statute now before us, no direct provision as to the assumption of risk is found, and in such cases it is held that the master cannot avail himself of the defense of assumption of risk where the injury complained of has resulted from his neglect of the duty imposed upon him by the statute, in Arkansas, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Missouri, Oklahoma, Oregon, North Carolina, Pennsylvania, Vermont, and Washing-

court in *Stephenson v. Brick & Tile Co.*, 151 Iowa, 371 (1911), "that an employee does not assume the risks incident to the use of a machine which is not guarded as required by statute, although he knows of the unguarded condition and apprehends the danger incident to the use thereof," (citing *Poli v. Numa Block Coal Co.*, *supra*). It is also true, however, that an employee working about an unguarded machine may be guilty of contributory negligence," [citing *Tyrrell v. Cain* (Iowa, 1910), 128 N. W. 536].

In *Verlin v. United States Gypsum Co.*, (Iowa), 135 N. W. 402 (1912), it was held that a servant whose hand was injured by being caught in the cogwheels of a machine while he was attempting to oil the same, because the wheels had negligently been left unguarded, in violation of statute, did not assume the risk of injury, since it was no part of his duty to remedy the defect. The court said that "the statute exacting proper guards for specified pieces of machinery, including cogwheels, was enacted for the protection of employees exposed to danger therefrom, and to recognize assumption of risk as a defense in such cases where it was not the employee's duty to remedy the defect would defeat the purpose of the law," citing *Poli v. Numa Block Coal Co.*, 149 Iowa, 104 (1910), and *Stephenson v. Sheffield Brick Co.*, 151 Iowa, 371 (1911).

Kansas. The question as to whether

the plea of assumed risk is available in an action based on a master's violation of a statute, was not decided in *Madison v. Clippinger*, 74 Kan. 700, 88 Pac. 260 (1906). The matter was however, definitely settled in *Western Furniture & Mfg. Co. v. Bloom*, 76 Kan. 127, 90 Pac. 821, 11 L. R. A. (N. S.) 225, 123 Am. St. Rep. 123 (1905), in which it was held that "in an action brought by an employee against his employer to recover damages for injuries received on account of the failure of the latter to comply with the provisions of "the Factory Act" (Laws 1903, chap. 356, p. 540), requiring manufacturers to safely guard their machinery for the purpose of protecting their employees, assumption of risk is not a defense." See, also, *Kansas Buff Brick & Mfg. Co. v. Stark*, 77 Kan. 648, 95 Pac. 1047 (1908).

"The prime object of the statute" (requiring guarding of salt pans), said the court in *Lewis v. Barton Salt Co.*, 82 Kan. 163, 107 Pac. 783 (1910), "is to deter employers from unnecessarily exposing their employees to danger, even when the danger is apparent and where employment is accepted or is continued under such circumstances that the common law imputes knowledge of the danger to the employee and consequently an assumption of risk." In this case it appeared that an employee fell into an unguarded pan in a soap factory when working

tion. On the other hand, it has been held that such defense is available to the master in Alabama, Colorado, Maine, Massachusetts, Minnesota, Montana, New Jersey, New York, Rhode Island, and Wisconsin. The same contradictory decisions are found in the Federal courts in different circuits as in the State courts. *Johnson v. Mammoth Vein Coal Co.*, 88 Ark. 243, 114 S. W. 722, 123 S. W. 1180, 19 L. R. A. (N. S.) 646; *St. Louis, I. M. & S. R. Co. v. White*, 93 Ark. 368, 125 S. W. 120; *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149, 12 Am. Neg. Rep. 381, 64 N. E. 610, 58 L. R. A. 944; *Poli v.*

at night in a poorly lighted room.

Kentucky. There is no assumption of risk by a miner of a coal operator's failure to comply with a statute (Russell's Ky. Stat., sec. 2489a), requiring props to be furnished in sufficient numbers to secure the roof of the place in which miners are compelled to work. Speaking with reference to contributory negligence and assumption of risk, the court said: "We think the safe rule is to hold that, unless the danger from lack of props is not only imminent, but so obvious that an ordinarily careful man would not have worked under the conditions, the owner has the responsibility. He having failed in his statutory duty, the liability for all consequences is upon him, unless the miner could see, or know, by ordinary care, that the situation was dangerous and imminently so. In other words, there is no assumption of risk by the laborer where the master neglects a statutory duty; but such laborer is still liable for his contributory negligence. The two propositions are not identical. To constitute contributory negligence, there must be some act or failure on the part of the laborer, in addition to the ordinary risks imposed by the character of his work under the conditions created by the master's conduct which would amount to culpable negligence on the laborer's part; such, for example, as a failure to look, to observe, to test in some way, the safety of the roof in

this instance, or, if it had been unsafe, and obviously so, and the danger thereby imminent, his continuing to work under those conditions." *Low v. Clear Creek Coal Co.*, 140 Ky. 754 (1910).

Louisiana. In Louisiana it has been held that the failure of a railroad company to erect "telltails" or warning signals at a distance of about 150 feet from the approaches to an overhead bridge, in accordance with the requirements of Act of 1882, No. 39, p. 51, to warn employees riding on the top of freight cars, does not create a risk which a brakeman assumed, although he stated in his application for employment, that he understood that it was necessary for the railroad company to have overhead bridges at certain points on its line, and that he was aware of his exposure to injuries by being knocked off the side or top of cars, unless he used care to avoid injury, and he agreed to acquaint himself with all overhead bridges. *Hailey v. Texas & P. R. Co.*, 113 La. 533 (1904).

But in a New York case it was held that a brakeman upon a railroad, who was aware of the fact that no warning signals had been placed upon a bridge, which crossed over the tracks, and that the bridge was so low as to be dangerous to trainmen riding on the tops of cars, assumes the risk of the lack of such warnings, although a statute requires them. *Fitzgerald v. New York Cent. & H. R. R. Co.*, 59 Hun. (N. Y.)

Numa Block Coal Co., 149 Iowa, 104, 127 N. W. 1105, 33 L. R. A. (N. S.) 646; Western Furniture Co. v. Bloom, 76 Kan. 127, 90 Pac. 821, 11 L. R. A. (N. S.) 225, 123 Am. St. Rep. 123; Hailey v. Texas Ry. Co., 113 La. 533, 30 South. 131; Low v. Clear Creek Coal Co., 140 Ky. 754, 131 S. W. 1007, 33 L. R. A. (N. S.) 656; Sipes v. Michigan Starch Co., 137 Mich. 258, 100 N. W. 447, 16 Am. Neg. Rep. 401; Van Doorn v. Heap, 160 Mich. 199, 125 N. W. 11; Durant v. Lexington Coal Co., 97 Mo. 62, 10 S. W. 484; Hill v. Saugested, 53 Or. 178, 93 Pac. 524, 22 L. R. A. (N. S.) 634; Biles v. Seaboard Air Line Railway Co., 143 N.

225, 12 N. Y. Supp. 932 (1891).

Michigan. In *Murphy v. Grand Rapids Veneer Works*, 142 Mich. 677 (1906), it was said that the assumption of risk by a servant arises from the contract of employment, and that the doctrine is not applicable where a statutory duty has been violated by the master, for the reason that the master cannot contract to violate a statute. In this case a servant fell down an elevator shaft in consequence of the master's failure to guard the same as required by Mich. Pub. Acts 1901, No. 113, sec. 5. The above statement was quoted with approval in *Swick v. Aetna Portland Cement Co.*, 147 Mich. 454 (1907).

A statement similar to the one in the preceding paragraph occurs in the opinion in *Sipes v. Michigan Starch Co.*, 137 Mich. 258, 16 Am. Neg. Rep. 401 (1904), in which it appeared that a servant was injured by a set-screw left exposed in a revolving shaft in violation of statute.

Missouri. The fact that the dangers from a rip-saw left unguarded in violation of statute are obvious to a servant, will not excuse a master from liability on the ground of assumed risk. *Stafford v. Adams*, 113 Mo. App. 717 (1905).

North Carolina. Under the "fellow-servant" law (N. C. Rev. 1905, sec. 2646), providing that any employee of a railroad company who suffers injury by reason of any defect in

the ways or appliances may maintain an action against the company, it was held in *Urquhart v. Durham & S. C. R. Co.*, 156 N. C. 581 (1911), that a brakeman who was injured by reason of the defective and dangerous condition of a step on the tender did not assume the risk of injury.

Ohio. The doctrine of assumed risk, said the court in *Laidlaw-Dunn-Gordon Co. v. Miller*, 31 Ohio Cir. Ct. Rep. 559 (1909), has no application where the alleged risk assumed is in violation of a master's statutory obligation to protect machinery and appliances. See, also, *McGarvey v. Detroit, T. & I. R. Co.*, 83 Ohio St. 273 (1911).

Pennsylvania. The defense of an assumption of risk by a servant was held not to be available to the master in an action for injuries based upon the negligence of the master in failing to perform a statutory duty to provide proper safeguards for cogwheels and gearing. In the opinion it was said that the courts are committed to the view that the requirements of a statute adopted in the exercise of the police powers of the State, for the protection of its citizens, cannot be impliedly waived by the parties to the contract of employment. *Valjago v. Carnegie Steel Co.*, 226 Pa. 514 (1910).

And in *Jones v. American Caramel Co.*, 225 Pa. 644 (1909), which was an action brought by a boy to recover damages for injuries to his hand caused by being caught in a revolving

C. 78, 20 Am. Neg. Rep. 663, 55 S. E. 512; Sans Bois Coal Co. v. Jane-way, 22 Okl. 425, 99 Pac. 153; Valjago v. Carnegie Steel Co., 226 Pa. 514, 75 Atl. 728; Kilpatrick v. Grand Trunk Ry. Co., 74 Vt. 288, 52 Atl. 531, 12 Am. Neg. Rep. 480, 93 Am. St. Rep. 887; Hall v. West & Slade Mill Co., 39 Wash. 447, 81 Pac. 915, 4 Ann. Cas. 587; Anderson v. Pacific National Lumber Co., 60 Wash. 415, 111 Pac. 337; Denver & Rio Grande Ry. Co. v. Gannon, 40 Colo. 195, 90 Pac. 853, 11 L. R. A. (N. S.) 216; Birmingham Ry. & Electric Co. v. Allen, 99 Ala. 359, 13 Am. Neg. Cas. 77, 13 South. 8, 20 L. R. A. 457; Gillin v. Patten & Sher-

fan used for ventilation purposes, the court said: "The Act of 1905 (which requires machinery of every description to be properly guarded) will become a dead letter if an employer who has failed to properly guard his machinery can relieve himself of that duty by the plea that the danger was so obvious that the injured employee ought to have been aware of it and was not entitled to any warning against it. Only the contributory negligence of an injured employee, lawfully employed, will relieve the employer from the consequences of his disregard of his statutory duty."

An employer cannot invoke the defense of assumption of risk by an employee, said the court in *Fegley v. Lycoming Rubber Co.*, 231 Pa. 446 (1911), in the face of a statute requiring safeguards to be supplied for dangerous machinery. In this case the workman was injured by falling into cogwheels, left unguarded in violation of statute, caused by the act of another workman in accidentally pushing a loaded wheelbarrow against the platform on which the former was standing.

Where the negligence charged in an action brought by a servant to recover damages for personal injuries, is the failure of the master to perform a statutory duty, such as the guarding of belting, shafting, set screws, and other dangerous machinery, questions relating to assumption of risk do not

arise. *Amiano v. Jones & Laughlin Steel Co.*, 233 Pa. 523 (1912).

South Carolina. In an action to recover damages for injuries sustained while carrying out a foreman's orders to hand up a piece of timber to a workman engaged in doing carpenter work on defendant's bridge, based on a South Carolina statute (Act Feb. 23rd, 1897), providing that any servant of any railroad company who shall suffer injury in the course of his service, by the negligence or incompetency of any other servant, or any defect in the appliances of the company, shall be entitled to maintain an action against the company, it has been decided that the master cannot interpose assumption of risk as a defense, but may interpose the defense of contributory negligence. *Lowe v. Southern Ry. Co.*, 85 S. C. 363 (1909).

Texas. The terms "defect and danger" used in a Texas statute, providing that in any suit to recover damages for injury to or death of an employee caused by negligence, the plea of assumption of risk, where the ground of the plea is knowledge or means of knowledge of the defect and danger which caused the injury or death, shall not be available, where a person of ordinary care would have continued in the service with the knowledge of the defect and danger, were construed in *Rice v. Lewis*, (Tex. Civ. App.), 125 S. W. 961 (1910), to cover the entire field of those de-

man R. Co., 93 Me. 80, 7 Am. Neg. Rep. 103, 44 Atl. 361; Keenan v. Edison Electric Illuminating Co., 159 Mass. 379, 15 Am. Neg. Cas. 638, 34 N. E. 366; Marshall v. Norcross, 191 Mass. 563, 77 N. E. 1151; Seely v. Tennant, 104 Minn. 354, 116 N. W. 648; Base v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 107 Minn. 260, 120 N. W. 360, 21 L. R. A. (N. S.) 138; Osterholm v. Boston & Montana Mining Co., 40 Mont. 508, 107 Pac. 499; Mika v. Passaic Print Works, 76 N. J. Law, 561, 70 Atl. 327; Knisley v. Pratt, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367; Langlois v. Dunn Worsted Mills, 25 R. I. 645, 16 Am. Neg.

facts and dangers to which persons engaged in operating a railroad were exposed, including danger of injury or death caused by the derailment of a logging train operated with the engine near the center of the train. See, also, *Houston & T. C. R. Co. v. Alexander*, 102 Tex. 497 (1909). On the contrary, in *International & G. N. R. Co. v. Schubert*, (Tex. Civ. App.), 130 S. W. 708 (1910), it was held that a servant engaged in railway service does not assume the risk of a "defect and danger" arising out of the negligence of the master, though known to him, where a person of ordinary care would continue in the service with knowledge thereof. See, also, *Ft. Worth & D. C. R. Co. v. Lynch*, (Tex. Civ. App.), 136 S. W. 580 (1911).

An injury caused by falling into a dangerous turn-table pit in the nighttime, made the basis of an action in *St. Louis & S. F. R. Co. v. Mathis*, 101 Tex. 342 (1908), occurred before the enactment of the statute mentioned in the preceding paragraph. The court said that "if a prudent man under the exigencies of the case, would have taken the chances and acted as plaintiff acted, he is acquitted of negligence. If he assumes the risk the question of contributory negligence does not arise, for by his assumption of the risk he absolutely precludes himself from a recovery for an injury that may result to him from such risk. Our Legislature had this distinction

in mind, when they passed the Act approved April 24, 1905, which practically abolishes the distinction."

Vermont. In Vermont it has been held that a train employee did not assume the risk of injury from using a freight car which had a ladder on the side, in violation of statute. The court said that statutory protection cannot be bought and sold, or waived by the beneficiaries. *Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288, 12 Am. Neg. Rep. 480, 93 Am. St. Rep. 887 (1902).

Washington. The repeal of the "Factory Act" of 1903 after an employee had sustained an injury, did not restore the right to rely upon the plea of assumption of risk, although the trial of the action took place after such repeal. *Miller v. Union Mill Co.*, 45 Wash. 199, 88 Pac. 130 (1907).

Wisconsin. A Wisconsin statute (Stat. 1898, sec. 1636j.), providing that the fact that an employee injured through the negligent omission of an employer to guard dangerous machinery continued in his employment with knowledge of the omission shall be no defense, was held in *Pulk v. Churchill*, 146 Wis. 477 (1911), to take away the defense of assumption of risk, and, therefore, an employer when sued to recover damages for injuries caused by being caught by an unguarded pulley cannot interpose the defense of assumed risk based on the fact that the servant injured had

Rep. 161, 57 Atl. 910; Helmke v. Thilmany, 107 Wis. 216, 8 Am. Neg. Rep. 172, 83 N. W. 360; Narramore v. Cleveland, C., C. & St. L. Ry. Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68 [cited and quoted in 16 Am. Neg. Rep. 404]; St. Louis Cordage Co. v. Miller, 126 Fed. 495, 14 Am. Neg. Rep. 476, 61 C. C. A. 477, 63 L. R. A. 551; Denver & Rio Grande R. Co. v. Norgate, 141 Fed. 247, 20 Am. Neg. Rep. 65, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981.

These are some of the cases in which the question has been considered. There are many others. Those cited illustrate most of the

worked around such pulley for some time. See, also, Willette v. Rhineland Paper Co., 145 Wis. 537 (1911).

But, in Kreider v. Wisconsin River Paper and Pulp Co., 110 Wis. 645 (1901), the defense of assumed risk was held to be available in an action brought to recover damages for personal injuries sustained by a servant, 19 years of age, who was injured by his clothing being caught on a set screw attached to a shaft which revolved a paper winder, left unprotected in violation of statute, as he leaned on the box of the machine, at the suggestion of an assistant, to keep the same in place; it appeared that the servant had notice that the shaft was not working smoothly. The court characterized the act of the plaintiff as gross misconduct.

The question whether a master was negligent in failing to guard certain gearing on a machine, as required by Wis. Stats. 1898, sec. 1636j., was not decided in Williams v. J. G. Wagner Co., 110 Wis. 456 (1901), as the employee injured was held to have assumed the risk of injury from coming into contact with unguarded gearing of a metal sewing machine with which he had worked for eight months.

The following cases also hold that a servant does not assume the risk of injury resulting from the master's breach of a statutory duty, and in an action to recover damages for injuries sustained it is not necessary to nega-

tive knowledge of the danger:—

Failure of a railroad company to equip its locomotives with headlights of 1500 candle power; engine derailed by running over cow at night which engineer could see from 300 to 500 feet ahead with oil light provided, whereas with light required he could have seen ahead from 1700 to 2000 feet. St. Louis, I. M. & S. R. Co. v. White, 93 Ark. 368 (1910).

—Wilful failure of a mine operator to comply with provisions of the Mines and Miners' Act. Himrod Coal Co. v. Adack, 94 Ill. App. 1 (1901); Moore v. Centralia Coal Co., 140 Ill. App. 291 (1908); McCray v. Moweaqua Coal Min. & Mfg. Co., 149 Ill. App. 565 (1909); Demereski v. Citizens' Coal Min. Co., 149 Ill. App. 513 (1909); Stevenson v. Avery Coal & Min. Co., 152 Ill. App. 565 (1910), *aff'd* 246 Ill. 609; Frenci v. Tazewell Coal Co., 157 Ill. App. 477 (1910); Spring Valley Coal Co. v. Patting, 210 Ill. 342, 20 Am. Neg. Rep. 57 (1904); Waschow v. Kelly Coal Co., 245 Ill. 516 (1910), *affirming* 151 Ill. App. 41; Diamond Block Coal Co. v. Cuthbertson, 166 Ind. 290, 20 Am. Neg. Rep. 66 (1905).

—Failure to keep a supply of props and timbers always on hand at working places in a mine; miner injured by caving in of roof of mine. Diamond Block Coal Co. v. Cuthbertson, 166 Ind. 290, 20 Am. Neg. Rep. 66 (1905). Same neglect charged in Davis Coal Co. v. Pollard, 158 Ind. 607, 92 Am.

phases in which the question has arisen. Reasons for distinguishing some of these apparently opposing decisions may be found in the differing details of the legislative Acts under consideration, but an analysis of the cases for this purpose is not worth while here, because, when all is said, there remains an irreconcilable conflict in the cases. The decision of *Poli v. Numa Block Coal Co.*, *supra*, [149 Iowa, 104, 127 N. W. 1105, 33 L. R. A. (N. S.) 646], is not in accordance with the prior decisions of the Supreme Court of Iowa in *Sutton v. Des Moines Bakery Co.*, 135 Iowa, 390, 112 N. W. 836, and *Martin v. Chicago, R.*

St. Rep. 319 (1902), in which the court said that a servant could not, on grounds of public policy, contract to assume the risk.

—Failure to employ competent engineer to operate hoisting devices in coal mines, and to furnish bars or rings as handholds for persons permitted to ride thereon, in consequence of which injuries were sustained by raising a cage at an excessive rate of speed and stopping suddenly before reaching the surface. *Kleinfelt v. J. H. Somers Coal Co.*, 156 Mich. 473, 21 *Am. Neg. Rep.* 674 (1909).

—Failure to provide proper amount of ventilation in a coal mine; miner's health impaired by breathing poisonous gases. *Thayer v. Kitchen*, 145 Ky. 554 (1911).

—Failure to provide persons to open and close ventilating doors in mines; driver caught between the cross beam of a door and the top of the coal on his car. *Indiana & C. Coal Co. v. Neal*, (Ind. App.), 76 N. E. 527 (1906). See former decision in the *Neal* case, (Ind. App.), 75 N. E. 295 (1905); rehearing denied (Ind. App.), 76 N. E. 527 (1906); and see decision in the *Indiana Supreme Court*, 166 Ind. 458, 20 *Am. Neg. Rep.* 62 (1906), which reversed the Appellate decision, 75 N. E. 295 (1905).

—Failure to sprinkle roadways and entries to a mine, in consequence of which dust exploded thereby causing injury. *Vandalia Coal Co. v. Yemm*,

— *Ind. —*, 92 N. E. 49 (1910).

—Failure to supply timbers for props for mines; miner killed by a large piece of slate or stone which fell upon him. *Boyd v. Brazil Block Coal Co.*, (Ind. App.), 50 N. E. 368 (1898); *Muren Coal & Ice Co. v. Copeland*, 46 Ind. App. 230 (1910), subsequent appeal in 91 N. E. 508.

—Failure to guard a set-screw and boring bit attached to machine; arm of workman caught and injured. *Buehner Chair Co. v. Feulner*, 28 Ind. App. 479 (1902).

—Failure to guard "screw conveyor" used to distribute crushed stone; employee injured by catching his foot in conveyor box when he accidentally stumbled. *United States Cement Co. v. Cooper*, 172 Ind. 599 (1909).

—Failure to guard "frizzer" in furniture factory; operator injured by coming into contact with machine. *Blanchard-Hamilton Furniture Co. v. Colvin*, 32 Ind. App. 398 (1903).

—Failure to guard a rip saw; *Espenlaub v. Ellis*, 34 Ind. App. 163 (1904); *Paul Mfg. Co. v. Racine*, 43 Ind. App. 695 (1909); *Davis v. Mercer Lumber Co.*, 164 Ind. 413, 18 *Am. Neg. Rep.* 45 (1905); *Van Doorn v. Heap*, 160 Mich. 199 (1910); *Erickson v. E. J. McNeeley & Co.*, 41 Wash. 509, 84 Pac. 3 (1906); *Rector v. Bryant Lumber & Shingle Mill Co.*, 41 Wash. 556, 84 Pac. 7 (1906); *Thomson v. Issaquah Shingle Co.*, 43 Wash. 253, 86 Pac. 544 (1906); *Johnsou v. Far West Lumber*

I. & P. R. Co., 118 Iowa, 148, 91 N. W. 1034, 59 L. R. A. 698, 96 Am. St. Rep. 371, 20 Am. Neg. Rep. 677; but it has since been followed in *Stephenson v. Sheffield Brick & Tile Co.*, 151 Iowa, 371, 130 N. W. 586, and is to be regarded now as the doctrine of that court.

Most of the cases holding that there is no assumption by a servant of the risk of violation by the master of a statutory duty imposed for the protection of the servant cite and rely upon the case of *Narramore v. Cleveland, C., C. & St. L. Ry. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68, decided by the United States Circuit Court of Appeals

Co., 47 Wash. 492, 92 Pac. 274 (1907); *Dukette v. Northwestern Woodenware Co.*, 61 Wash. 95, 111 Pac. 1065 (1910); *Anderson v. Pacific Nat. Lumber Co.*, 60 Wash. 415, 111 Pac. 337 (1910); *Gustafson v. A. J. West Lumber Co.*, 51 Wash. 25, 97 Pac. 1094 (1908).

—Failure to provide emery wheel with an exhaust fan to carry off dust; servant's eye injured by dust lodging therein. *Indianapolis Foundry Co. v. Lackey*, (Ind. App.), 97 N. E. 849 (1912).

—Failure to guard an emery belt used in a factory to polish metal; workman injured by a particle of metal thrown from belt. *La Porte Carriage Co. v. Sullender*, (Ind. App.), 71 N. E. 922 (1904).

—Failure to guard a device used for crushing old car wheels; servant injured by piece of wheel flying over casing. *Green v. American Car & Foundry Co.*, 163 Ind. 135 (1904).

—Failure to guard vats of boiling water in a veneer factory; servant injured by falling therein due to slipping of a defective log hook. *Chamberlain v. Waymire*, 32 Ind. App. 442 (1903).

—Operation of train backward by night without lights on rear end, as required by a city ordinance, in consequence of which a switchman was killed. *Chicago & E. R. Co. v. Lawrence*, 169 Ind. 319 (1907).

—Failure to guard an elevator shaft; employee injured by falling therein

while moving a truck onto the elevator. *Murphy v. Grand Rapids Veneer Works*, 142 Mich. 677 (1906).

—Failure to equip cars with automatic couplers; employee injured by being compelled to go between cars. *Patten v. Faithorn*, 152 Ill. App. 426 (1910); *McGarvey v. Detroit, T. & I. R. Co.*, 83 Ohio St. 273 (1911).

—Failure to use proper couplers for cars on logging train; experienced brakeman injured while trying to make coupling. *Betterly v. Boyne City, G. & A. R. Co.*, 158 Mich. 385 (1909).

—Failure to equip electric cars with electric or air brakes, in consequence of which a motorman was killed in a collision between his car and a train at a crossing. *Rivers v. Bay City Traction & El. Co.*, 164 Mich. 696 (1910).

—Failure to provide a cage in a mine with an iron cover; workman injured by fall of coal from car down shaft. *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62, 16 Am. Neg. Cas. 397 (1888).

—Failure to guard cog wheels of planer in a box factory; servant, seventeen years of age, injured by losing his balance and falling into cogs while assisting one of the company for whom he worked in pulling wet board away from planer. *Bair v. Heibel*, 103 Mo. App. 621 (1903).

—Failure to guard shafting in consequence of which an employee was caught and killed. *Collins v. Star Pa-*

for the Sixth Circuit on July 5, 1899. The case was an action for personal injuries to a switchman in the defendant's railroad yards occasioned by his getting his foot caught in a guard rail which the defendant had not blocked, in violation of a statute of Ohio which required the blocking of guard rails so as to prevent the feet of employees from being caught in them, and prescribed a penalty for the violation of the Act. The trial court directed a verdict for the defendant on the ground that, the defendant's failure to block its switches and rails being obvious, the plaintiff must be held to have assumed the risk notwith-

per Mill Co., 143 Mo. App. 333 (1910).

—Failure to equip cars with self-couplers; laborer in railroad yards injured while attempting to make coupling. *Greenlee v. Southern R. Co.*, 123 N. C. 977, 41 L. R. A. 399, 65 Am. St. Rep. 734 (1898).

—Failure to guard side-edger saw; injury to servant by contact. *Hill v. Saugested*, 53 Ore. 178, 98 Pac. 524, 22 L. R. A. (N. S.) 634 (1909).

—Failure to guard a set-screw in shafting; clothing of servant caught on set-screw, causing injury, while he occupied dangerous position in performance of his duties. *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915 (1905).

—Failure to provide belt shifters; employee injured while assisting in removing belt. *Whelan v. Washington Lumber Co.*, 41 Wash. 153, 19 Am. Neg. Rep. 587, 83 Pac. 98 (1905).

—Failure to guard shafting used in running grindstones, and coupling connecting lines of shafting; employee injured by stumbling against shafting while engaged in sharpening large chisel. *Hoveland v. Hall Bros. Marine R. & Ship Building Co.*, 41 Wash. 164, 82 Pac. 1090 (1905).

—Failure to guard power shaft extending a short distance from the floor under a long sewing machine table and used to operate many machines; operator's hair caught in shaft when she knelt down to search for fallen shuttle. *Balzer v. Warring*, (Ind.), 95

N. E. 257 (1911).

—Failure to surround vats containing hot liquids with proper safeguards, in consequence of which an employee was injured by falling into an unguarded opening caused by raising of a trap door in the top of one of such vats. *Lind v. Uniform Stave & Package Co.*, 140 Wis. 183 (1909).

B. Special Statutory Provisions.

Some statutes contain provisions expressly abolishing the defense of assumption of risk. Thus, in the case of *Kansas City, M. & B. R. Co. v. Flippo*, 138 Ala. 487 (1903), which was an action to recover damages sustained by a brakeman on a railroad based on a violation of a Federal statute requiring the use of automatic couplers, it was held that the defense of assumed risk had been abolished by the statute.

An Illinois statute (Laws 1905), making it unlawful for a carrier engaged in moving traffic between points within the State, to haul any car not equipped with automatic couplers which shall work for the purposes intended, imposes an absolute duty upon the carrier to provide such appliances, and to keep them in repair. The statute further expressly provides that "any employee of such common carrier who may be injured by any train, locomotive, tender car or similar vehicle in use contrary to the provisions of this Act, shall not be deemed to have assumed the risk thereby occasioned, nor to

standing the statute. The judgment was reversed, and in the opinion it is said that "assumption of risk is a term of the contract of employment, express or implied, from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk." Proceeding upon the theory that the doctrine of the assumption of risk rests really upon contract, the court holds that a contract to waive the performance of a duty imposed by statute and enforceable by a criminal prosecution will not be recognized by a court, but is void.

have been guilty of contributory negligence, because of continuing in the employment of such common carrier." In an action by a switchman who was injured while attempting to open, by hand, an automatic coupler which would not work by impact, the railroad company cannot, under the provisions of the statute, set up assumption of risk as a defense. *Luken v. Lake Shore & M. S. R. Co.*, 248 Ill. 377 (1911). And in *Patten v. Faithorn*, 152 Ill. App. 426 (1910), it was held that in an action based upon the failure of a master to use automatic couplers as required by statute, the doctrine of assumed risk does not apply.

A similar decision was rendered in *Johnson v. Great Northern R. Co.*, 178 Fed. 643, 102 C. C. A. 89 (1910), which was an action based on the Federal Safety Appliance Act (U. S. Comp. Stat. 1901, p. 3174), providing that "any employee of any such common carrier, who may be injured by any locomotive car or train in use contrary to the provisions of this act, shall not be deemed thereby to have assumed the risk occasioned thereby, although continuing in the employment of such carrier after the unlawful use of such locomotive car had been brought to his knowledge." The same rule attains in Ohio based on a statute similar to the Federal law. *McGarvey v. Detroit, T. & I. R. Co.*, 83 Ohio St. 273 (1911).

And under a provision of the Code

of Iowa which states that "any railroad employee who may be injured by the running of such an engine (without safety appliances) contrary to the provisions of said sections shall not be considered as waiving his right to recover damages by continuing in the employment of the company," it was held in *Bryce v. Burlington, C. R. & N. R. Co.*, 119 Iowa, 274 (1903), that if the statute requiring automatic couplers applied to switch engines which were not so equipped, and in consequence thereof an employee was injured, "the question of the assumption of risk would be eliminated from the case." The court held, however, that the statute was inapplicable to such engines.

In North Carolina it has been held that the doctrine of assumption of risk has been abolished by the Act of Feb. 23, 1897, which makes railroad companies liable for injuries caused by defects in machinery, ways, or appliances, and expressly declares that any contract waiving the benefit of the statute is null and void. *Coley v. North Carolina R. Co.*, 128 N. C. 534 (1901); 129 N. C. 407, 57 L. R. A. 817 (1901); *Cogdell v. Southern R. Co.*, 129 N. C. 398 (1901); *Thomas v. Raleigh & A. Air-Line R. Co.*, 129 N. C. 392 (1901); *Mott v. Southern R. Co.*, 131 N. C. 234 (1902).

In *Baynes v. Billings*, 30 R. I. 53, 21 Am. Neg. Rep. 239 (1909), it was held that the plea of assumption of risk

The case of *Knisley v. Pratt*, *supra*, [148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367], decided by the Court of Appeals of the State of New York in 1896, is cited in a number of the cases which sustained the defense of assumption of risk where the act complained of is the violation of a statutory duty, and the reasoning is substantially the same in all such cases. The New York statute (Laws 1890, c. 398, § 12) required all cogwheels to be covered in factories where women were employed, and the plaintiff, who was a woman engaged in cleaning machinery while it was in motion, was injured by being caught in the

was not available as a defense to an action to recover damages for injuries to a boy who had been requested by the elevator boy to go to the top of the elevator to put in place a screen which was intended to prevent objects from falling into the elevator, but, on account of being misplaced, had itself become a source of danger, and who, while so engaged was caught and injured when the elevator was started, in consequence of the defendant's failure to furnish certain mechanical device designed to prevent the starting of an elevator car while the doors of the shaft are open, as required by a statute, which expressly states that it shall be no defense to the action that the person injured had knowledge that the elevator was being operated contrary to the requirements of statute. But see *Langlois v. Dunn Worsted Mills*, 25 R. I. 645, 16 Am. Neg. Rep. 161 (1904), *supra*.

The Constitution of South Carolina, Art. 9, sec. 15, provides that "knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to the conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." It is, therefore, the law of this State that a servant cannot assume the risk of injury. *Youngblood v. South Carolina & G. R. Co.*, 60 S. C. 9, 85 Am. St.

Rep. 824 (1900); *Bodie v. Charleston & W. C. R. Co.*, 61 S. C. 468, 10 Am. Neg. Rep. 473 (1901); *Carson v. Southern R. Co.*, 68 S. C. 55, 16 Am. Neg. Rep. 158 (1903).

Likewise, in Virginia, the Constitution, sec. 162, provides that "knowledge by any railroad employee injured of the defective or unsafe condition or character of any machinery, ways, appliances or structure shall be no defense to an action for injury caused thereby." This provision has been construed as abrogating the former rule which forbade recovery by an employee who knowingly used defective machinery. *Norfolk & W. R. Co. v. Cheatwood's Adm'x*, 103 Va. 356 (1905).

IV. Violation of Ordinances.

In Illinois a distinction has been made between the effect of the violation of municipal ordinances requiring the guarding of dangerous situations, but which do not impose any civil liability in case of disobedience, and statutes which create such liability. Cases on this subject hold that such ordinances do not preclude an assumption of the risk of their violations. *Chicago Packing & Prov. Co. v. Rohan*, 47 Ill. App. 640 (1893); *Munn v. L. Wolff Mfg.*, 94 Ill. App. 122 (1900); *Browne v. Siegel, Cooper & Co.*, 191 Ill. 226 (1901).

In *Munn v. L. Wolff Mfg. Co.*, *supra*, the court held that one who was

unprotected cogwheels and in consequence lost her arm, though a compliance with the statute, which was entirely practicable without impairing the efficiency of the machinery, would have been a complete protection to her. The court differentiates ordinary risks and obvious risks, holding that the rule of the assumption of risk in the two cases is entirely distinct. Doubt is expressed as to whether the assumption of obvious risks can be said to rest wholly upon the implied agreement of the employee, and the language used by the Supreme Judicial Court of Massachusetts in the case of *O'Maley v. South Boston Gas-*

employed at an emery wheel, which was not protected as required by an ordinance providing that "in every factory, workshop or other place or structure where machinery is employed, the belting, shafting, gearing, elevators and every other thing, when so located as to endanger the lives and limbs of those employed therein while in the discharge of their duties, shall be, as far as practicable, so covered or guarded as to insure against any injury to such employees," cannot recover for injuries sustained by reason of the want of such an appliance, where he exposed himself to the danger and continued his work with full knowledge of the danger.

Violations of ordinances in Indiana, contrary to the ruling in Illinois, as to the operation of trains are given the same effect as violations of statutes with reference to the question of assumption of risk. *Pittsburgh, C. C. & St. L. R. Co. v. Moore*, 152 Ind. 345, 7 Am. Neg. Rep. 100, 44 L. R. A. 638 (1898); *Baltimore & O. S. W. R. Co. v. Peterson*, 156 Ind. 364 (1901).

V. Attempt to Comply With Statute.

It has been held that the "Factory Act" (Wash.) of 1903, which requires employers to provide proper guards for cogs, saws and dangerous machinery, does not deprive a master of the right to interpose the defense of assumption of risk, where he had made a *bona fide* effort and had exercised due care to provide a guard for an edger, which

an experienced employee had used for three years without objection, and where the employee was injured by an accident which could not have been reasonably anticipated. The court said that where a master has made an intelligent, careful, judicious, and honest effort to comply with the requirements of the Factory Act, and an experienced and skillful servant has ample opportunity for seeing, knowing and learning whether the guard provided is proper, and with such opportunities continues his work, he will be held to have assumed the risk of his employment, including the sufficiency of such guard; to hold otherwise, the court continued, would be to announce not only the doctrine that the master must provide the servant with a reasonably safe place to work, but also that he must under all circumstances be an insurer of the life and safety of his servant. *Johnson v. Northern Lumber Co.*, 42 Wash. 230, 84 Pac. 627 (1906).

And in *Daffron v. Majestic Laundry Co.*, 41 Wash. 65, 82 Pac. 1089 (1905), it appeared that the master made a *bona fide* effort to provide a proper guard for a mangle used in a laundry, but on account of the improper character of the guard adopted the hand of the servant in charge of the machine, who was an experienced operator, became tangled in apron strings and was forcibly drawn over the top of the guard. The statute prescribed no particular kind of guard nor was there

light Co., 158 Mass. 135, 15 Am. Neg. Cas. 583, 32 N. E. 1119, 47 L. R. A. 161, is quoted as follows: "The doctrine of the assumption of the risks of his employment by an employee has usually been considered from the point of view as a contract, express or implied, but, as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the *volenti non fit injuria*. One who knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the

any kind which was recognized as the best. The court said "he (master) had no standard to go by. He could only rely upon his own experience, observation, and judgment. Before appellant can be deprived of the defense of assumed risk, it must affirmatively appear that it violated this Factory Act in not having a proper guard. It is only required to provide guards sufficient to protect against such dangers as reasonably intelligent and experienced laundrymen would anticipate. • • • This guard was for the purpose of keeping the operator's hands from going between the feed roll and cylinder as she pushed the clothes therein. It answered this purpose perfectly. Respondent did not get her hand caught in this way, but in an unusual and unexpected manner. The guard was not put on to protect against flying apron strings that might lasso a feeder's hand and pull it up over and back of the guard and then down between the roll and cylinder. Evidently no mangle maker or owner ever foresaw such an accident, or imagined a necessity for such a guard against such an occurrence. The law is well settled that, where an employer places a guard sufficient to protect against all dangers reasonably to be anticipated, he is not guilty of negligence because the guard fails to protect against an unforeseen danger against which it was not intended as a protector."

VI. Federal Decisions.

As shown in the following cases, the federal courts in some instances follow the construction given by the State courts to statutes requiring employers to guard dangerous situations; in other instances, the Federal courts regard the question as one of general law to be determined upon general principles, and not as a question on which the Federal courts are bound to follow the decision of the courts of the States under whose statutes the causes of action arose. It would seem that the question is one of construction of State statutes, which, by well recognized principles, should be determined according to the construction given by the State courts.

The decision rendered in *Glenmont Lumber Co. v. Roy*, 126 Fed. 524, 525, 15 Am. Neg. Rep. 483, 61 C. C. A. 506 (1903), while not expressly based on the holdings of the State courts, is clearly in harmony with them. In this case it was held that the Factory Act of Minnesota, which requires employers to guard dangerous machinery as far as practicable, does not abolish the defense of assumption of risk.

Likewise, in *E. S. Higgins Carpet Co. v. O'Keefe*, 79 Fed. 900, 25 C. C. A. 220 (1897), which arose in New York, the court followed the doctrine established by the State courts to the effect that the Factory Act requiring

two, his voluntary assumption of the risk absolves the other from any particular duty to him in this respect and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger." The opinion of the Court of Appeals then proceeds: "Where the obvious risks of the business result in injury, the inability of the employee to sue is due to the fact that he voluntarily assumed those risks, not necessarily under an implied contract so to do, but by an independent

the guarding of cogwheels does not impose any liability upon a master for injuries received by a servant arising from the obvious risks of his employment.

In a case arising in Illinois, based on a mine owner's willful failure to maintain an open passageway around the landing place at the bottom of a shaft, as required by a State statute, the court adopted the construction given the statute by the State courts, to the effect that assumption of risk was no defense. The court cited numerous decisions rendered by the State courts and stated that the decision reached was in accordance with "the established construction of said statute by the Supreme Court of Illinois." *Chicago-Coultersville Coal Co. v. Fidelity & Casualty Co.*, 130 Fed. 957, 20 Am. Neg. Rep. 72 (1904).

Also, in *Bolan-Darnall Coal Co. v. Williams*, 7 Ind. Ter. 648 (1907), it was decided that under an Act of Congress (32 Stat. 631, chap. 1356), which provides that "the owners and managers of every coal mine shall furnish their miners with pure air, which shall be forced through such mine by proper machinery to the face of every working place, so as to dilute and render harmless, and expel therefrom, the noxious or poisonous gases, and whenever practicable, the entries, rooms and all openings shall be kept dampened with water to cause the coal dust to settle," and further providing that a

violation shall constitute a misdemeanor,—the defense of assumption of risk was not available in an action to recover for injuries caused by an explosion of gas in a coal mine.

It was held in *Narramore v. Cleveland, C. C. & St. L. R. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68 (1899), that a servant did not assume the risk of injury from the master's violation of an Ohio statute requiring the blocking of guard rails and frogs. The court cited no Ohio decision directly on the point decided, but followed the doctrine established in that State.

An Ohio statute (99 Ohio Laws, p. 25), relating to the liability of railroad companies for injuries sustained by employees, and providing that such companies shall be liable for damage resulting from personal injuries or death when such injury or death was caused by a defect in any track or rail required by the company to be used by its employees, and that such employees shall not be deemed to have assumed the risk occasioned by such defect, and that contributory negligence shall not bar a recovery when the negligence was slight, was held in *Erie R. Co. v. White*, 187 Fed. 556, 109 C. C. A. 322 (1911), to be applicable to the Federal Courts in Ohio, and the court construed the statute as abolishing entirely the defense of assumption of risk and contributory negligence, substituting therefor the rule of comparative negligence.

act of waiver evidenced by his entering the employment with a full knowledge of all the facts. The distinction is not, however, of great importance in the view we take of the statute and its effect upon the rights of the parties. We are of the opinion that there is no reason, in principle or authority, why an employee should not be allowed to assume the obvious risks of the business, as well under the Factory Act as otherwise. There is no rule of public policy which prevents an employee from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks. The statute does, indeed, contemplate the protection of a certain class of laborers; but it does not deprive them of their free agency and the right to manage their own affairs."

The doctrine of the assumption of risk is firmly established as a

But the Circuit Court of Appeals, in *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 15 Am. Neg. Rep. 476, 61 C. C. A. 477, 63 L. R. A. 551 (1903), contrary to the doctrine declared by the State court of Missouri, held that the Factory Act of that State (2 Rev. Stat. 1899, sect. 6433), which requires gearing and belting to be guarded, did not abolish the defense of assumption of risk. This decision was relied on in *Federal Lead Co. v. Swyers*, 161 Fed. 687, 88 C. C. A. 547 (1908), in which assumed risk was held to be available as a defense. In speaking of the decisions of the Missouri Courts of Appeal which hold a contrary doctrine, the Federal court said that while such decisions are entitled to respectful consideration, they are not binding on the Federal courts.

An Iowa statute (Acts 1907, c. 181, p. 182), which provides that "in all cases where the property, works, machinery or appliances of an employer are defective or out of repair and the employee has knowledge thereof, and has given written notice to the employer * * * of the particular defect or want of repair, * * * no employee after such notice, shall by reason of remaining in the employment

with such knowledge, be deemed to have assumed the risk incident to the danger arising from such defect or want of repair," was construed by the court in *Barber Asphalt Pav. Co. v. Austin*, 186 Fed. 443, 108 C. C. A. 365 (1911), as not superseding the common law which made a complaint of defects, promise to repair, and remaining in employment in reliance upon the promise of the master essential to secure immunity from assumption of risk, but as relieving the servant from the risk only after giving notice of the defect. "We think," said the court, "the statute was intended to confer a cumulative or additional right rather than to abridge an existing one."

The question as to a master's liability, was determined in *Denver & R. G. R. Co. v. Norgate*, 141 Fed. 247, 20 Am. Neg. Rep. 65, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981 (1905), on general principles, and the decision was not based on the holdings of the State in which the cause of action arose. The court reviewed many decisions of the courts of the various States, and held that the weight of authority is in favor of the view that the defense of assumption of risk on the part of

part of the law of master and servant. The relation of master and servant exists only by virtue of contract, and to that relation, the instant it is created, the law attaches the doctrine of the assumption of risk. Under that doctrine the servant assumes all the ordinary risks incident to the business, and all the extraordinary risks of which and of the dangers of which he has knowledge, and all other obvious risks, and this whether any of such risks existed at the time of his employment or may have come into existence subsequently, provided, only, they have come to his knowledge. This condition attaches at the time of his employment and continues unchanged during his employment. It is an incident of the relation and has its origin in the contract by which that relation is formed. It becomes a part of the contract because the law attaches the liability or obligation to the contract.

It may be that the ground of the doctrine of assumption of risk, as well as of its extension to known extraordinary risks and to obvious

an employee who has notice that certain guard rails are not blocked, is not taken away by a statute (Colo. Sess. Laws 1897, chap. 69, secs. 1 and 2), which imposes the duty upon railroad companies to block all guard rails, and makes a failure so to do *prima facie* evidence of negligence in an action to recover for injuries resulting therefrom.

The Federal Safety Appliance Act (Act of March 2, 1893, 27 Stat. 531, c. 196), which requires interstate carriers to equip their cars with automatic couplers and continuous brakes, expressly provides in sec. 8, that "any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned although continuing in the employment of such carrier, after the unlawful use of such locomotive, car or train had been brought to his knowledge." *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 17 Am. Neg. Rep. 412, 49 L. Ed. 363 (1904), reversing 117 Fed. 462, 12 Am. Neg. Rep. 398, 54 C. C. A. 508.

The object of the Federal Safety Appliance Act, said the court in *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681 (1907), is to protect the lives and limbs of railroad employees by rendering it unnecessary for men operating couplers to go between the ends of the cars. The court reversed the decision of the State court of Pennsylvania (207 Pa. 198, 15 Am. Neg. Rep. 419), on the ground that sec. 8 of the Automatic Coupler Act, having exonerated employees from the charge of assumption of risk, their rights should not be sacrificed by charging them with assumption of risk under another name, that is, contributory negligence. In this case it appeared that plaintiff's intestate was killed while attempting to comply with an order to couple a shovel car which was not equipped with an automatic coupler, but instead had an iron draw-bar fastened underneath the car by means of a pin, and which projected about a foot beyond the car. In order to make the coupling, it was necessary for the employee to go between the rails and in a crouching position underneath the car, guide the drawbar, which weighed

risks, is the maxim *volenti non fit injuria*; but, nevertheless, it is only as an incident of the contract of employment—as a part of such contract—that it comes into existence at all. A waiver of the benefit of the statute is in the nature of a contract. It is an assent to a change in the servant's rights and liability under his contract of employment. His conduct may be evidence of such assent, but it does not change the character of the relation.

The assumption of risk by the servant is not different in its character from the obligation of the master to use reasonable care to furnish the servant a reasonably safe place in which to work and reasonably safe tools to work with. In neither case is the obligation an express term of the contract, but in each case it arises out of the contract, by operation of law. While the master is bound to reasonable care for the safety of the servant's place and tools, he is not bound to the highest degree of care. He is not bound to furnish a place that is absolutely safe or the safest possible place, but only one that is reasonably safe. He is not bound to furnish the safest tools or machinery or the best and most approved, but only such as are reasonably safe. The master may conduct his business in his own way, though another way would be less hazardous and the servant who

about 80 pounds, into a slot. In attempting to direct the drawbar, he missed the slot and his head, which he had lifted a little too high, was crushed. The State court granted a nonsuit on the ground of contributory negligence on the part of the employee killed. The Federal court, however, without raising the question whether such a defense would be available, under the statute, held that the act of the brakeman did not constitute contributory negligence. In discussing that subject the court said: "Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the

risk on that ground. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind. * * * If a man not intent on suicide but desiring to live, is said to be chargeable with negligence as matter of law when he miscalculates the height of the car behind him by an inch, while his duty requires him, in his crouching position, to direct a heavy drawbar moving above him into a small slot in front, and this in the dusk, at nearly nine o'clock of an August evening, it is utterly impossible for us to interpret

enters his employ knowing the method in which the business is conducted assumes the risk of such method.

The doctrine of assumption of risk in this class of cases is of modern origin. Its application to the law of master and servant was first suggested by Lord Abinger in *Priestley v. Fowler*, 3 Mees. & W. 1, 15 Am. Neg. Cas. 410n. [Exch. 1837], and was first declared in this country in *Farwell v. Boston & Worcester R. Corp.*, 4 Metc. (Mass.) 49, 15 Am. Neg. Cas. 407, 38 Am. Dec. 389, in 1842. The opinion in that case, written by Chief Justice Shaw, places the doctrine squarely on the basis of contract, and its reasoning has been universally adopted by the courts of this country. Speaking of the exemption of the master from liability to his servant for an injury through the negligence of a servant of the same master engaged in a different department of duty, it is said: "The master is not excused from liability, in such case, because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself, and he is not liable in tort as for the negligence of his servant because the person suffering does not stand

this ruling as not, however unconsciously, introducing the notion that to some extent the man had taken the risk of the danger by being in the place at all. But whatever may have been the meaning of the local courts, we are of opinion that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was so inevitably and clearly attached to the risk which Schlemmer did not assume, that to enforce the statute requires that the judgment should be reversed." Four justices dissented from the opinion and judgment of the Federal court.

The matter of assumption of risk has been held to be immaterial in a case arising under the Federal Safety Appliance Act, as a provision of that law expressly declares that in any action based on a violation of the Act, the employee injured shall not be held to have assumed the risk of injury from violations. *Johnson v. Great*

Northern R. Co., 178 Fed. 643 (1910).

In *Inland Steel Co. v. Kachwinski*, 151 Fed. 219 (1907), the Federal court followed the Indiana rule that a master, against whom an action is brought to recover for injuries caused by being hit by a piece of scrap iron, due to the master's failure to guard a place where scrap iron and steel were broken into smaller bits by allowing a large steel ball to fall upon the scrap, cannot set up the defense of assumption of risk.

An Oregon statute (Laws 1907, p. 302), which requires every owner of a factory, mill, or workshop to provide reasonable safeguards for all machinery which it is practicable to guard, under penalty for failure to comply with its provisions, and which gives a right of action to an employee whose injury is the proximate result of the master's noncompliance with its provisions, was held in *Welsh v. Barber Asphalt Pav. Co.*, 167 Fed. 465 (1909), to preclude the defense of assumption of

in the relation of a stranger, but is one whose rights are regulated by contract, express or implied." The mutual rights and liabilities of master and servant were universally determined upon that basis for half a century without question, until legislation of the character of that now in question, which is of more recent origin than that of the assumption of risk, began to be adopted in various States. Then the theory began to be asserted that the doctrine had its origin, not in a contract, but in the maxim *volenti non fit injuria*, and that the maxim applied equally whether the risk assented to arose from mere neglect or the violation of a statutory duty. Whatever the origin of the doctrine, in the end it is the servant's agreement that creates the assumption of risk. The servant must be *volens* (that is, willing, consenting, agreeing), and to apply the maxim amounts to nothing other than to say the law regards the servant as consenting to existing conditions by continuing his service with knowledge of the conditions (that is, that he agrees to them and assumes them as a part of his contract). It has been doubted whether the maxim has any application where there has been a breach by a defendant of a statutory obligation. *Baddeley v. Granville*, L. R. 19 Q. B. Div. 425; *Yarmouth v. France*, L. R. 19 Q. B. Div. 647; *Wilson v. Merry*, 19 L. T. (N. S.) 30, L. R. 1 H. L. Sc. 326, 16 Am. Neg. Cas. 756n.

risk. The court said that the question involved was one as to which the Federal courts are bound by the decisions of the highest court of the State, and in absence of a holding by the Supreme Court of Oregon on the point, the decisions of the highest court of Washington, from which State the Oregon statute was borrowed, would be followed.

In a case arising in a Federal court in the State of Washington, it was held that the defense of assumption of risk was precluded by the Act of Congress of June 11th, 1906, known as the "Employer's Liability Act," which provides "that no contract of employment, * * * entered into by or on behalf of any employee, * * * shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee." *Malloy v. Northern Pac.*

R. Co., 151 Fed. 1019 (1907). The plaintiff in this case was injured while operating an unguarded saw in the workshop of a railroad company which conducted an interstate business.

Under the Washington Code, secs. 6587, 6594, which requires the operators of mills and factories to provide reasonable safeguards for machinery and vats, whenever practicable, and which make such operators liable for injuries to employees resulting from noncompliance with its provisions, it was held in *Carstens Packing Co. v. Swinney*, 186 Fed. 50, 108 C. C. A. 152 (1911), that a servant did not assume the risk of injury from falling into a vat of hot glue, left uncovered contrary to the provisions of statute, caused by the slipping of a plank carrying him into a vat, while he was attempting to oil the bearings of a shaft in the performance of his duties. In

The passage of a law like that now under consideration implies that the class of employees for whose protection it was intended had not been able to protect themselves without it. Its object, as indicated by the title of the Act, is to provide for the health, safety, and comfort of employees in factories, mercantile establishments, mills, and workshops in this State, and the authority for it is found in the police power of the State. The effect of it is to create a new situation in the relation of master and servant, and to present the new question whether the doctrine of assumption of risk heretofore applied to that relation should apply in the same way to the new conditions. The duty of the master has been changed. He may no longer conduct his business in his own way. He may no longer use such machinery and appliances as he chooses. The measure of his duty is no longer reasonable care to furnish a safe place and safe machinery and tools, but in addition to such reasonable care he must use in his business the means and methods required by the statute. The law does not leave to his judgment the reasonableness of inclosing or protecting dangerous machinery, or permit him to expose to increased and unlawful dangers such of his employees as may be driven by force of circumstances to continue in his employ rather than leave it and take chances on securing employment elsewhere under lawful conditions. The guarding of the machinery mentioned in the statute is a duty required of the master for the protection of his workmen, and he owes the specific duty to each person in his employ. To omit it is a misde-

its opinion the court cited numerous decisions rendered by the Supreme Court of Washington.

An employee is not relieved from assumption of risk in working around unguarded machinery, nor from his own want of ordinary care which may directly contribute to produce an injury, by the enactment of Minn. Rev. Laws, 1905, sec. 1813, which declares that all saws and other dangerous appliances in any factory, mill or workshop shall be so located as not to be dangerous to workmen, and every dangerous place in and about mills, near to which any employee is obliged to pass or to be employed, shall be securely fenced or otherwise protected. In this case it appeared that the plaintiff was familiar with the machinery

he had been directed to repair, and instead of stopping the machinery before attempting to remedy the trouble, as he was authorized to do, he opened the housing at night, and thrust his hand into a known place of danger next to the saw in an attempt to discover the cause of the trouble and to repair it while the machinery was in motion, in consequence of which his arm was severed by the saw. "There were two ways," said the court, "in which he could have replaced the chain upon the sprocket wheels, one of which was absolutely safe and known by him to be so, the other extremely dangerous and so known to him to be. He voluntarily chose the latter way when there was no occasion or necessity for so doing, and in doing

meanor subjecting him to a criminal prosecution. The necessity for such legislation is suggested by a consideration of a sentence from the opinion in the Knisley Case [Knisley v. Pratt, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367], which says: "There is no rule of public policy which prevents an employee from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks." Notwithstanding the theoretical liberty of every person to contract for his labor or services and his legal right to abandon his employment if the conditions of service are not satisfactory, practically, by stress of circumstances, poverty, the dependence of his family, scarcity of employment, competition, or other conditions, the laborer frequently has no choice but to accept employment upon such terms and under such conditions as are offered. Under such circumstances, experience had shown, before the passage of the statute, that many employers would not exercise a proper degree of care for the safety of their workmen. The servant had to assume the risk of injury, and the master took the chance of a suit for damages. It was to meet this precise situation and protect employees in such situation that this legislation was adopted. It imposes upon the master an absolute, specific duty—one which he cannot delegate and against his neglect of which he ought not to be allowed to contract. If the employee must assume the risk of the employer's violation of the statute, the Act is a delusion so far as the protection

so received the injury of which he complains. He cannot, therefore, hold the defendant responsible for an injury which thus directly resulted from his own voluntary and unnecessary choice of the more dangerous of the two ways of doing the work he attempted to do." *Erdman v. Deer River Lumber Co.*, 182 Fed. 42, 104 C. C. A. 482 (1910).

The statute of Wyoming (Laws 1899, secs. 2573, 2582) requiring the fencing of machinery at and about a mine, and providing that a cause of action shall accrue to a servant who is injured by the wilful failure of the master to comply with the law, was construed in *Maki v. Union Pac. Coal Co.*, 187 Fed. 389, 109 C. C. A. 221 (1911), as not abolishing the defense of assumption of risk, but the court

held that it is still available to the defendant in such an action. While recognizing that there are authorities which hold a different doctrine, the court regarded the better rule and weight of authority as in favor of the availability of assumed risk as a defense. In reaching this decision the court relied upon *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 15 Am. Neg. Rep. 476, 61 C. C. A. 477, 63 L. R. A. 551 (1903), and *Denver & Rio Grande R. Co. v. Norgate*, 141 Fed. 247, 20 Am. Neg. Rep. 65, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981 (1905).

VII. English Decisions.

The English decisions relating to a servant's knowledge of the master's

of the former is concerned. He is in the same condition as before it was passed. He is compelled to accept the employment; he must assume the risk; when he is killed or crippled, he and those dependent on him have no remedy, and the law is satisfied by the payment of a fine. The more completely the master has neglected the duty imposed upon him by statute for the servant's protection, the more complete is his defense for the injury caused by that neglect. Justice requires that the master, and not the servant, should assume the risk of the master's violation of the law enacted for the servant's protection, and in our opinion this view is in accordance with sound principles of law.

For many years we have held, in the construction of the Mining Act, that neither assumed risk nor contributory negligence is available as a defense to a suit for damages caused by a willful violation of the provisions of that Act. *Bartlett Coal & Mining Co. v. Roach*, 68 Ill. 174, 14 Am. Neg. Cas. 308n; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590, 14 Am. Neg. Cas. 309n; *Catlett v. Young*, 143 Ill. 74, 14 Am. Neg. Cas. 307, 32 N. E. 447; *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 7 Am. Neg. Rep. 40, 55 N. E. 131; *Western Anthracite Coal & Coke Co. v. Beaver*, 192 Ill. 333, 61 N. E. 335; *Spring Valley Coal Co. v. Patting*, 210 Ill. 342, 20 Am. Neg. Rep. 57, 71 N. E. 371; *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 75 N. E. 375, 20 Am. Neg. Rep. 62; *Waschow v. Kelly Coal Co.*, 245 Ill. 516, 92 N. E. 303. It is true that these decisions were based partly on the language of the section which gives an action for an injury occasioned by a "willful" violation of the Act and partly on the requirement contained in section 29 of article 4 of the Constitution that the General Assembly shall pass laws for the protection of operative miners. The reasoning on which they are based is, however, applicable to the present case, as is the language in *Carterville Coal*

breach of his statutory duty to take certain precautions to protect the servant from injury by dangerous machinery, have established the doctrine that the defendant does not discharge his statutory obligation by merely affecting the servant with notice of the danger, which, but for the former's breach of duty, would not exist. *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. (N. S.) 340, 13 Am. Neg. Cas. 128n, 130n (1887). The same doctrine was applied in *Britton v. Great Western Cotton Co.*, L. R. 7 Exch. 130, 13 Am. Neg. Cas.

529n (1872), in which a servant was injured by being caught in an unprotected flywheel while engaged in oiling the bearings.

In *Baddeley v. Granville*, L. R. 19 Q. B. Div. 423, 56 L. J. Q. B. (N. S.) 501 (1887), the court regarded a contract between a master and servant releasing the former from liability for injuries caused by the master's violation of a statutory duty as against public policy, the theory being that there ought to be no encouragement given to the making of an agreement between two persons whereby one of

Co. v. Abbott, *supra*, [181 Ill. 495, 7 Am. Neg. Rep. 40, 55 N. E. 131]: "To hold that the same principle as to contributory negligence should be applied in a case of one who is injured in a mine because the owner, operator, or manager totally disregarded the statute, as in other cases of negligence, is to totally disregard the provisions of the Constitution, which are mandatory in requiring the enactment of this character of legislation, and would destroy the effect of the statute and in no manner regard the duty of protecting the life and safety of miners." A constitutional law is of as much force as the Constitution itself. This law was passed to protect employees, and in view of the construction given to the Mining Act (Hurd's Rev. St. 1909, c. 93) in regard to the assumption of risk, the General Assembly must have supposed that the same construction would be given to this Act in that regard. The Supreme Courts of other States have construed Acts designed for the protection of miners in the same way in regard to the assumption of risk, though no constitutional provision was involved. *Johnson v. Mammoth Vein Coal Co.*, *supra*, [88 Ark. 243, 114 S. W. 722, 123 S. W. 1180, 19 L. R. A. (N. S.) 646]; *Poli v. Numa Block Coal Co.*, *supra*, [149 Iowa, 104, 127 N. W. 1105, 33 L. R. A. (N. S.) 646]; *Low v. Clear Creek Coal Co.*, *supra*, [140 Ky. 754, 131 S. W. 1007, 33 L. R. A. (N. S.) 656].

Counsel for the appellee have cited the case of *Browne v. Siegel, Cooper & Co.*, 191 Ill. 226, 60 N. E. 815, as sustaining their contention that the statute does not preclude the defense of assumption of risk. The plaintiff's decedent there was killed by falling down an elevator shaft, and the negligence charged was a failure to comply with an ordinance of the city of Chicago requiring all elevator shafts to have iron doors opening from the inside, only. The decedent was a porter employed by the defendant cleaning up the floors of a store building at night. The opening to the elevator was closed with a wire gate which could be raised from the outside, and on the night of his death

them shall be at liberty to break the law which has been enacted for the benefit and protection of the other. The court said: "If the supposed agreement between the deceased (servant) and the defendant (master), in consequence of which the principle *volenti non fit injuria* is sought to be applied, comes to this that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed

on him by statute and shall connive that his disregard of the statutory obligation imposed on him for the benefit of others as well as of himself, such an agreement would be in violation of public policy and ought not to be listened to."

In *Weblin v. Ballard*, L. R. 17 Q. B. Div. 122, 55 L. J. Q. B. (N. S.) 395, 13 Am. Neg. Cas. 129n (1886), it was held that the Employers' Liability Acts had taken away the general defense

the decedent's foreman went to the gate and raised it, the elevator not being there, and leaned into the shaft to see where the elevator was. The decedent, following the foreman, and in the dim light not observing that the elevator was not there, stepped into the shaft and was killed. The case was regarded as one of contributory negligence as well as of assumed risk, and the judgment rendered on a verdict directed for the defendant was affirmed. The ordinance in that case did not, as does the statute here, impose a specific duty for the protection of employees, but was a general ordinance for the regulation of the operation of elevators in the interest of the public generally. It did not impose a specific duty in favor of any person or class of persons. This is the same distinction which was referred to in the *Narramore Case*, *supra*, [*Narramore v. Cleveland, C. & St. L. R. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68], in distinguishing the Massachusetts cases, which were not suits under a statute enjoining a specific duty upon a master for the protection of his servants, but were suits under an Employer's Liability Act, which relieved the servant from certain defenses by the master in suits for injury sustained in the master's service but did not attempt to change the master's duty to the servant or to change the standard of negligence between them as it was fixed at common law. The Supreme Court of Indiana, in *Monteith v. Kokomo Wood Enameling Co.*, *supra*, [159 Ind. 149, 12 Am. Neg. Rep. 381, 64 N. E. 610, 58 L. R. A. 944], noted a distinction between Employers' Liability statutes which provide, in general terms, that the employer shall be liable for an injury to an employee where the injury is occasioned by reason of defects in the condition of ways, works, tools, plants, and machinery, etc., and statutes which require of employers the performance of a specific duty, such as to fence or guard dangerous machinery. *American Rolling Mill Co. v. Hullinger*, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460. In the latter case assumption of

that a servant assumed the risks of his employment.

For a general review of the English decisions, see Dresser on Employers' Liability, sec. 116 (latter part).

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This note does not cover the question whether the doctrine of assumed risk is available as a defense in an action based on the employment of a child under the statutory age; nor does it cover the question whether contribu-

tory negligence is available as a defense to an action based on the master's breach of a statutory duty.

Since the statutes imposing upon employers of labor the duty of protecting their employees against dangerous situations have been subject to numerous amendments in the course of their development, the early cases dealing with the doctrine of assumed risk have been omitted from this note.

risk is not available as a defense, and in this particular the ordinance in the case of *Browne v. Siegel, Cooper & Co.* [191 Ill. 226, 60 N. E. 815] differs from the statute in the present case.

The Circuit Court erred in refusing to submit the case to the jury. Its judgment, and that of the Appellate Court, will be reversed, and the cause remanded to the Circuit Court.

Reversed and remanded.

BRESETTE v. E. B. & A. L. STONE COMPANY.

[SUPREME COURT OF CALIFORNIA, JANUARY 26, 1912.]

162 Cal. 74, 121 Pac. 312.

1. Master and Servant—Knowledge of Danger—Sufficiency of Pleading.

A complaint in an action for personal injuries, which contains a general allegation of the absence of knowledge on the part of the injured employee, of the danger involved in reaching over an unguarded gear wheel to oil moving machinery, is demurrable, where the specific allegations show that he must have known of the defects and the danger therefrom.

2. Master and Servant—Obvious Danger—Assumption of Risk.

One who voluntarily accepts employment as oiler of a rock crushing machine, which he is instructed how to oil when the machinery is in motion, and continues to perform his duties for a period of nearly two months without making any complaint as to the conditions, assumes the risk of injury from having his arm caught in an unprotected gearing while attempting to oil the machinery when it was in operation.

3. Master and Servant—Obvious Danger—Failure to Instruct.

An employer is not guilty of negligence in failing to instruct an adult employee whose duty it is to oil the machinery of a rock crusher while in motion, of the obvious danger of allowing his hand or arm to be caught in unguarded parts of the machinery.

Appeal by plaintiff from a judgment of the Superior Court of the City and County of San Francisco, rendered on sustaining a demurrer to a complaint in an action brought to recover damages for personal injuries caused by coming into contact with the uncovered gear wheel of a machine. Affirmed.

For appellant—Costello & Costello.

For respondent—Heller, Powers & Ehrman (Sydney Schlesinger, of counsel).

NOTE.

On the subject of Averments of Negligence in Complaint, see note in 5 Am. Neg. Rep. 51.

And on the subject of Accidents to Servants by Machinery, see note in 10 Am. Neg. Rep. 301.

And on the subject of Duty of Master to Warn and Instruct Servant, see note in 16 Am. Neg. Rep. 137.

And on the subject of Assumption of Risk by Servant, see notes in 4 Am.

Neg. Rep. 289, 300; 5 Am. Neg. Rep. 22, 120; 7 Am. Neg. Rep. 72, 588; 8 Am. Neg. Rep. 71, 90, 183, 638; 9 Am. Neg. Rep. 196, 280, 306, 467; 10 Am. Neg. Rep. 212.

And on the subject of Voluntary Assumption of Risk by Servant as Defense to Master's Breach of Statutory Duty, see exhaustive annotation on page 828 of this volume of Negligence and Compensation Cases Annotated (1 N. C. C. A.)

ANGELLOTTI, J. This is an action for damages for personal injuries alleged to have been suffered by reason of the negligence of defendant. A demurrer was sustained to plaintiff's second amended complaint, and judgment went for defendant. This is an appeal by plaintiff for such judgment.

The complaint contained two counts. Facts shown by each are as follows: Defendant was the owner of a rock crusher, which it was operating. On November 15, 1908, plaintiff, who had up to that time followed the occupation of a barber, and had never at any time had any experience in the care and operation of machinery, was employed by defendant as oiler in and about said rock crusher. He continued in the service of defendant as such oiler from November 15, 1908, to January 10, 1909, being at all times under the supervision and direction of one Patrick Martin, the manager and general superintendent of defendant. On said January 10th while performing his duties as such oiler, he was severely injured, "while in the act of reaching over the gear wheel, in motion, with his left hand, in order to locate the oil hole preparatory to oiling the said machinery, by having his jumper sleeve on his left arm caught in certain gearing," with the result that his left arm was drawn into said gearing, up to the left shoulder, and injured to such an extent as to require amputation. The gearing was without a cover and wholly unprotected by guards or otherwise.

The first count alleged negligence on defendant's part in failing to instruct plaintiff of the dangers attending his employment. It alleged the following facts: Defendant had full knowledge of his inexperience in the matter of machinery. Nevertheless it never properly instructed him, and never warned him "as to the dangers or hazards connected with the said machinery." When he was instructed as to his duties in the matter of oiling, the said machinery was in motion, and he was following these instructions when injured. Defendant carelessly and negligently failed to instruct him as to the proper manner of oiling the machinery, and never "cautioned plaintiff as to the dangerous character of said machinery." His injuries "were caused by reason of defendant's failure to warn said plaintiff of the dangers attending the employment," and by reason of plaintiff's lack of knowledge of said dangers.

The second count alleged negligence producing the injuries in the failure of defendant to furnish a suitable and safe place for plaintiff's work. The material allegations were as follows: "That on the 10th day of January, 1909, the said plaintiff, as the hired servant and workman of said defendant corporation in and about the said rock crusher, was negligently, imprudently, and carelessly set to work in and about

the said rock crusher in an unsuitable and unsafe place, and very near and by certain dangerous, unfenced, and unguarded machinery; that said defendant well knew that the said place at which said plaintiff was set to work was dangerous and unsafe; that said plaintiff was standing in the only practical place in which he could stand to oil said machinery, and in close proximity to said dangerous, unprotected, and unguarded gearing, whereby the said plaintiff was exposed to great and unnecessary risks not required by his employment; that the said defendant disregarding its duty to provide a safe place for said plaintiff to work in and disregarding its duty to use reasonable and ordinary care for the safety of said plaintiff, nevertheless ordered said plaintiff to work in and about said unsafe place, and plaintiff was injured by reason of the unsafeness and dangerous condition of said place in which he was set to work; that plaintiff had no knowledge of the unsafe condition of the said place in which he was required to work in and about said rock crusher, and was never at any time warned or informed as to the unsafe condition of said place."

The allegations of the amended complaint, hereinbefore substantially set forth, show that the sole reason for the unfortunate injury to plaintiff was that he allowed the sleeve of his coat to catch in certain exposed and uncovered gearing over which it was necessary for him to reach in the performance of his work as an oiler. The complaint in one count is substantially that the defendant was negligent in not warning him, he being a man inexperienced in the use of machinery, as to the danger and the necessity for care in the performance of this duty; and in the second count that the defendant was negligent in setting him to work in a place dangerous by reason of the fact that the gearing about which he was compelled to perform his work was unprotected and unguarded. There is absolutely nothing in the complaint to intimate that the exposed condition of this gearing was not obvious. Fairly construed, the allegations of the amended complaint affirmatively show that the only condition of the machinery having to do with plaintiff's injury was patent to any casual observer, and that any one, no matter how inexperienced he was in the use or knowledge of machinery, would necessarily know of the risk entailed in working over gearing, and that if he allows his hands or arms to come in contact with the gearing he would be severely injured. Whatever danger was attendant upon the performance of his duties by plaintiff in that place was clearly apparent to any one. That danger was the possibility of allowing his hands or arms to come in contact with the uncovered and unguarded gearing. That one's hands or arms will be hurt, if allowed to become involved in the cogs of moving machinery, is so

apparent a fact that certainly any adult must know it. In spite of such a general allegation of the absence of knowledge on the part of the employee as we have in this case, a complaint is demurrable, if the specific allegations thereof show that he must have known of the defects and the danger therefrom. See 1 Labatt on Master and Servant, § 388; *Cleveland, etc., Co. v. Powers*, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485.

Under these circumstances, even if we assume that there was any negligence on the part of defendant in respect to the matters alleged in either count, a complete answer to plaintiff's action is to be found in the law relative to assumption of risks, as it existed in this State at the time he received his injuries. With full knowledge of the alleged defect in the matter of the machinery, and with full understanding and appreciation of the dangers therefrom attendant upon the performance of his duties as oiler, he voluntarily entered upon the employment and continued therein to the time of his accident, a period of nearly two months, without making any complaint as to the conditions. As to such a situation, under the law as it was at the time of the accident, there is practically no disagreement among the authorities. The employee assumes the risk, and cannot recover for injuries resulting therefrom. This rule is recognized by section 1970 of the Civil Code, where it is provided that mere knowledge by an employee of the defective or unsafe character or condition of any machinery, etc., shall not be a bar to recovery, unless it shall also appear that the employee fully understood, comprehended, and appreciated the dangers incident to its use, and thereafter consented to use the same, or continued in the use thereof. It was not until the Act of April 8, 1911, (Stats. 1911, p. 796), was enacted that any attempt was made to abolish the defense of assumption of risk. The rule and its limitations have been fully discussed in various decisions of this court. See *Long v. Coronado R. Co.*, 96 Cal. 269, 13 Am. Neg. Cas. 328, 31 Pac. 170; *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598, 7 Am. Neg. Rep. 588, 60 Pac. 176, 49 L. R. A. 33; *Murdock v. Oakland, etc., Co.*, 128 Cal. 22, 7 Am. Neg. Rep. 584, 60 Pac. 469; *Anderson v. Seropian*, 147 Cal. 201, 208, 81 Pac. 521; *Sanborn v. Madera Flume, & Trading Co.*, 70 Cal. 261, 266, 13 Am. Neg. Cas. 436, 11 Pac. 710; *Vestner v. Northern Cal., etc., Co.*, 158 Cal. 284, 289, 110 Pac. 918; *Bush v. Wood*, 8 Cal. App. 647, 655, 97 Pac. 709. See, also, 1 Labatt on Master and Servant, §§ 388, 393. As was said in *Brett v. Frank & Co.*, 153 Cal. 272, 94 Pac. 1052: "The requirement that the place of employment shall be reasonably safe is itself always to be considered in connection with the rule of law as to the assumption by the employee

of known and understood risks." There is nothing in the facts of this case, as disclosed by the complaint, to take it out of the operation of the rule precluding recovery. The facts shown by a fair construction of the allegations of the complaint present a case where the only inference that can reasonably be drawn is that plaintiff knew that the gearing over which he was to reach in doing his work was uncovered and unguarded, and understood and appreciated the risk and danger attendant upon the performance of his work under such conditions and that he nevertheless voluntarily assumed his employment without any complaint as to the conditions, and continued therein to the time of the injury, a period of nearly two months, without any complaint or criticism of such conditions.

In view of what has been shown as to the obviousness of the danger, it is also clear that the defendant was not guilty of negligence productive of injury failing to instruct plaintiff as to such danger. There was nothing to tell him in this regard that he did not already know, or must be presumed to have known. In this connection, the language of the Supreme Court of Massachusetts, in *Wilson v. Mass. Cotton Mills*, 169 Mass. 67, 3 Am. Neg. Rep. 552, 47 N. E. 506, is pertinent. The court said: "The plaintiff's contention is that he was set to work on a dangerous machine without proper instructions. But it is difficult to see what the defendant's officers could have told him that he did not already know. It was apparent that the wheels were uncovered. They were certainly not bound to tell him that if he got his hand in the cogs he would be hurt. This any child of ten would know."

While, as to the matters alleged in the second count, it may be assumed that, even although there was no statute in this State requiring guards on such machinery as was here in use, a conclusion that defendant was guilty of negligence in failing to provide guards for the protection of its employees could be sustained, the answer to any claim of liability on account thereof is to be found in what we have said regarding the rule of assumption of risk.

We have examined the cases cited by learned counsel for plaintiff, and find nothing therein in conflict with the views we have stated. For instance, in *Larson v. Bloemer*, 156 Cal. 752, 106 Pac. 62, a case specially relied upon, this court substantially said that the testimony was conflicting upon the question of the ignorance of plaintiff as to the dangers of her employment, and, in reply to the claim that the peril was so obvious that she must be presumed to have been fully cognizant of it, said that from the photograph of the mangle, and the explanation of its mechanism contained in the record, it appeared that plaintiff could not see the heated cylinder which produced so much of the

damage suffered by her. Substantially, the case was held to be one where the evidence was of such nature as to support a conclusion that plaintiff did not appreciate the danger of her employment under the existing conditions. Similarly, in other cases earnestly relied upon by appellant, including that of *Ingerman v. Moore*, 90 Cal. 410, 13 Am. Neg. Cas. 442, 27 Pac. 306, 25 Am. St. Rep. 138, there were circumstances sufficient to make the question of the plaintiff's want of knowledge and full appreciation of the danger and risk, under the existing conditions, one upon which reasonable persons might differ. In *Jacobson v. Oakland Meat Co.*, [Cal.] 119 Pac. 653, likewise, there were special circumstances clearly avoiding the conclusion, as matter of law, that plaintiff had been guilty of contributory negligence. The cases cited by appellant from other jurisdictions are all distinguishable from the case at bar, with the possible exception of *Thompson v. Edward P. Allis Co.*, 89 Wis. 523, 62 N. W. 527. The views expressed in the later case of *Renne v. United States, etc., Co.*, 107 Wis. 305, 83 N. W. 473, on the question of the assumption of risk of an obvious peril, are not at all in conflict with our conclusion. The law, as we understand it, was correctly stated to the jury in that case in an instruction declaring that, if the danger "was such an open and obvious danger as that, considering his age, intelligence, experience, judgment, and discretion, he ought, in the exercise of reasonable and ordinary care, to have known and appreciated it, then the law is that the plaintiff assumed the risk of such danger, and that he cannot recover."

We see no escape from the conclusion that the second amended complaint presented such a case as a matter of law, and that it therefore failed to state a cause of action. We are not to be understood as holding that it is essential for a plaintiff to anticipate in his complaint, either the defense of contributory negligence, or assumption of risk, by alleging facts negating either, but are simply applying the well established rule that, where the allegations of the complaint do affirmatively show contributory negligence or assumption by the plaintiff of the peril producing injury, the pleading fails to state a cause of action for damages.

The judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.

SECOND EMPLOYERS' LIABILITY CASES.

No. 120. MONDOU v. NEW YORK, NEW HAVEN & H. R. R. CO.

No. 170. NORTHERN PACIFIC RAILWAY CO. v. BABCOCK.

No. 289. NEW YORK, NEW HAVEN & H. R. R. CO. v. WALSH.

No. 290. WALSH v. NEW YORK, NEW HAVEN & H. R. R. CO.

[UNITED STATES SUPREME COURT, JANUARY 15, 1912.]

223 U. S. 1.

1. Master and Servant—Employer's Liability—Abrogation of Common-Law Rules.

Congress, in the exercise of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employees, to the extent of abrogating the fellow-servant rule, restricting the defenses of contributory negligence and assumption of risk and extending the carrier's liability to cases of death.

2. Master and Servant—Employer's Liability—Power of Congress.

The power of Congress to regulate the liability of a carrier engaged in interstate commerce, for injuries sustained by an employee while engaged in such commerce, embraces instances where the causal negligence is that of another employee engaged in interstate commerce.

3. Master and Servant—Employer's Liability Act—Liberty of Contract.

The provision of the Employer's Liability Act of April 22, 1908, c. 149, § 5 (35 Stat. 65), declaring void any contract, rule, regulation or device, the purpose or intent of which is to enable a carrier to exempt itself from the liability which the Act creates, is not repugnant to the Fifth Amendment to the Constitution of the United States as an unwarranted interference with the liberty of contract.

4. Master and Servant—Employer's Liability Act—Classification.

That the liability created by the Employer's Liability Act of April 22, 1908, c. 149 (35 Stat. 65), is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit of all employees of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains or to hazards that differ from those to which other employees in such commerce, not within the Act, are exposed, does not render the classification repugnant to the "due process of law" clause of the Fifth Amendment.

5. Master and Servant—Employer's Liability Act—Supremacy over State Laws.

The regulation of the relations of common carriers by railroad and their employees, while both are engaged in interstate commerce, prescribed by the Employer's Liability Act of April 22, 1908, c. 149 (35 Stat. 65), supersedes the laws of the States in so far as the latter cover the same field.

6. Courts—Employer's Liability Act—Enforcement in State Court

Rights arising under the Employer's Liability Act of April 22, 1908, c. 149 (35 Stat. 65), may be enforced in the courts of the States when their jurisdiction as fixed by local laws, is adequate to the occasion.

7. Courts—Employer's Liability Act—Declining Jurisdiction

A State court is not at liberty to decline cognizance of actions to enforce rights arising under the Employer's Liability Act of April 22, 1908, c. 149 (35 Stat. 65), either on the ground that the policy manifested by the Act is not in harmony with the policy of the State or because the exercise of jurisdiction would be attended with inconvenience and confusion.

Facts concerning each of the above actions may be found in the statement of facts below.

For plaintiff in error in No. 120—Donald G. Perkins

For defendant in error in No. 120—Edward D. Robbins, and Joseph F. Berry.

As *amicus curiae*, in No. 120—J. C. McReynolds.

For plaintiff in error in No. 170—Charles W. Bunn.

For defendant in error in No. 170—Samuel A. Anderson.

For plaintiff in error in No. 289, and defendant in error in No. 290—John L. Hall.

For plaintiff in error in No. 290, and defendant in error in No. 289—Endicott P. Saltonstall, and George D. Burrage.

STATEMENT OF FACTS: No. 120. (*Mondou v. New York, New Haven & Hartford Railroad Company*).

This was an action by a citizen of Connecticut against a railroad corporation of that State to recover for personal injuries suffered by the plaintiff while in the defendant's service. The injuries occurred in Connecticut August 5, 1908, the action was commenced in one of the Superior Courts of that State in October following, and the right of action was based solely on the Act of Congress of April 22, 1908 (35 Stat. 65, c. 149). According to the complaint, the injuries occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the States and while the plaintiff, as a locomotive fireman, was employed by the defendant in such commerce, and the injuries proximately resulted from negligence of the plaintiff's fellow servants, who also were employed by the defendant in such commerce. A demurrer to the complaint was interposed

upon the grounds, first, that the Act of Congress was repugnant in designated aspects to the Constitution of the United States, and, second, that even if the Act were valid a right of action thereunder could not be enforced in the courts of the State. The demurrer was sustained, judgment was rendered against the plaintiff, the judgment subsequently was affirmed by the Supreme Court of Errors of the State (82 Conn. 373, 73 Atl. 762), upon the authority of *Hoxie v. N. Y., N. H. & H. R. Co.*, 82 Conn. 352, 73 Atl. 754, 21 Am. Neg. Rep. 42, and the plaintiff then sued out the present writ of error.

No. 170. (*Northern Pacific Railway Co. v. Babcock*).

This was an action by the personal representative of a deceased employee of a railroad corporation to recover, for the exclusive benefit of the surviving widow, for the death of the employee, which resulted from an injury suffered in the course of his employment. The injury and death occurred in Montana, September 25, 1908, the action was commenced in the Circuit Court of the United States for the District of Minnesota, October 4, 1909, and the right of action was based solely on the Act of Congress before mentioned. It appeared, from the complaint, that the injury occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the States, and while the deceased, as a locomotive fireman, was employed by the defendant in such commerce; that the injury proximately resulted from negligence of fellow servants of the deceased, who also were employed by the defendant in such commerce; that the deceased resided in Montana and died without issue or a surviving father or mother, but leaving a widow and also a sister, and that if the statutes of Montana were applicable the recovery should be for the equal benefit of the widow and sister, and not for the exclusive benefit of the widow, as prayed in the complaint and as provided in the Act of Congress. The defendant challenged the validity of the Act by a demurrer to the complaint, and in the subsequent proceedings insisted that the recovery, if any, should be for the benefit of the widow and sister jointly and not for the benefit of the widow alone, but the demurrer and the insistence were overruled and judgment was rendered for the plaintiff for the exclusive benefit of the widow, as prayed. By a direct writ of error the defendant seeks a reversal of that judgment.

Nos. 289, 290. (*Walsh v. New York, New Haven & Hartford R. R. Co.*; *New York, New Haven & Hartford R. R. Co. v. Walsh*).

These writs of error relate to the judgment in a single case. It was an action by the personal representative of a deceased employee of a railroad corporation to recover, for the benefit of the surviving widow

and children, for the death of the employee, which resulted from an injury suffered in the course of his employment. The injury and death occurred in Connecticut, February 11, 1909, the action was commenced in the Circuit Court of the United States for the District of Massachusetts in July following and the right of action asserted in the second count of the declaration was based on the Act of Congress before mentioned. There were several other counts, but they may be passed without special notice. It was charged in the second count that the injury occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the States and while the deceased, in the course of his employment by the defendant in such commerce was engaged in replacing a drawbar on one of the defendant's cars then in use in such commerce, and that the injury proximately resulted from negligence of fellow servants of the deceased in pushing other cars against the one on which he was working. A demurrer to that count challenged the validity of the Act of Congress, but the demurrer was overruled. The defendant answered, putting in issue all that was stated in that count, and also alleging that the deceased, by his own negligence, contributed to the injury which resulted in his death and therefore that the damages should be diminished in proportion to the amount of negligence attributable to him. A trial to the court and a jury resulted in a verdict and judgment for the plaintiff upon the second count, and there was a judgment for the defendant upon the other counts. Each party has sued out a direct writ of error from this court. The defendant calls in question the ruling upon its demurrer and other rulings in the progress of the cause, notably such as related to the nature of the employment in which the deceased and the fellow servants whose conduct was in question were engaged at the time of the injury and to the admeasurement of the damages. The plaintiff makes no complaint of the judgment upon the second count and, if it shall be affirmed, wishes to waive her objections to the judgment upon the other counts.

The Act whose validity is drawn in question, 35 Stat. 65, c. 149, and the amendment of April 5, 1910, 36 Stat. 291, c. 143, are as follows:

"An Act relating to the liability of common carriers by railroad to their employees in certain cases.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in

damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband, and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

"Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Sec. 7. That the term 'common carrier' as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

"Sec. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled 'An Act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employees' approved June eleventh, nineteen hundred and six.

"Approved April 22, 1908."

"An Act to Amend an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April twenty-second, nineteen hundred and eight.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

"Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdic-

tion of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

"Sec. 2. That said Act be further amended by adding the following section as section nine of said Act:

"Sec. 9. That any right of action given by this Act to a person suffering shall survive to his or her personal representative, for the benefit of the surviving widow, or husband and children of such employee, and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

"Approved, April 5, 1910."

MR. JUSTICE VAN DEVANTER. The principal questions presented in these cases as discussed at the bar and in the briefs are: 1. May Congress, in the exertion [exercise] of its power over interstate commerce, regulate the relations of common carriers by railroad and their employees while both are engaged in such commerce? 2. Has Congress exceeded its power in that regard by prescribing the regulations which are embodied in the Act in question? 3. Do those regulations supersede the laws of the States in so far as the latter cover the same field? 4. May rights arising under those regulations be enforced, as of right, in the courts of the States when their jurisdiction, as fixed by local laws, is adequate to the occasion?

The clauses in the Constitution (Art. 1, § 8, clauses 3 and 18) which confer upon Congress the power "to regulate commerce among the several States" and "to make all laws which shall be necessary and proper" for the purpose have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these:

1. The term "commerce" comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

2. The phrase "among the several States" marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally.

3. "To regulate," in the sense intended, is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

4. This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

5. Among the instruments and agents to which the power extends are the railroads over which transportation from one State to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees.

6. The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power. *Cooley v. Board of Wardens*, 12 How. (U. S.) 299, 315-317, 13 L. Ed. 996, 1003, 1004; *The Lottawanna*, 21 Wall. (U. S.) 558, 577, 22 L. Ed. 654, 662; *Sherlock v. Alling*, 93 U. S. 99, 103-105, 23 L. Ed. 819, 821; *Smith v. Alabama*, 124 U. S. 465, 479, 31 L. Ed. 508, 512; *Nashville, C. & St. C. Ry. Co. v. Alabama*, 128 U. S. 96, 99, 32 L. Ed. 352, 353, 2 Inter St. Com. Rep. 238, 9 Sup. Ct. 28; *Pierce v. Van Dusen*, 78 Fed. Rep. 693, 698-700, 69 L. R. A. 705, 24 C. C. A. 280, 47 U. S. App. 339; *Balt. & Ohio R. Co. v. Baugh*, 149 U. S. 368, 378, 13 Sup. Ct. 914, 37 L. Ed. 772, 776; *Patterson v. Bark Eudora*, 190 U. S. 169, 176, 23 Sup. Ct. 821, 47 L. Ed. 1002, 1006; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 17 Am. Neg. Rep. 412, 49 L. Ed. 363; *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; *Employers' Liability Cases*, 207 U. S. 463, 495, 28 Sup. Ct. 141, 52 L. Ed. 297, 308; *Adair v. United States*, 208 U. S. 161, 176-178, 52 L. Ed. 436, 443, 444, 28 Sup. Ct. 277, 13 Am. & Eng. Ann. Cas. 764; *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618, 55 L. Ed. 878, 882, 31 Sup. Ct. 621; *Southern Railway Co. v. United States*, 222 U. S. 20, 3 N. C. C. A. 822, 56 L. Ed. 2, 32 Sup. Ct. 2.

As is well said in the brief prepared by the late Solicitor-General: "Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything

which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the Interstate Commerce Act."

In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employees, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged.

We come, then, to inquire whether Congress has exceeded its power in that regard by prescribing the regulations embodied in the present Act.* It is objected that it has, (1) because the abrogation of the fellow-servant rule, the extension of the carrier's liability to cases of death, and the restriction of the defenses of contributory negligence and assumption of risk have no tendency to promote the safety of the employees or to advance the commerce in which they are engaged; (2) because the liability imposed for injuries sustained by one employee through the negligence of another, although confined to instances where the injured employee is engaged in interstate commerce, is not confined to instances where both employees are so engaged; and (3) because the Act offends against the Fifth Amendment

to the Constitution (a) by unwarrantably interfering with the liberty of contract and (b) by arbitrarily placing all employers engaged in interstate commerce by railroad in a disfavored class and all their employees engaged in such commerce in a favored class.

Briefly stated, the departures from the common law made by the portions of the Act against which the first objection is leveled are these: (a) The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee; (b) the rule exonerating an employer from liability for injury sustained by an employee through the concurring negligence of the employer and the employee is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributes to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the damages corresponding to the amount of negligence attributable to the employee; (c) the rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury; and (d) the rule denying a right of action for the death of one person caused by the wrongful act or neglect of another is displaced by a rule vesting such a right of action in the personal representatives of the deceased for the benefit of designated relatives.

Of the objection to these changes it is enough to observe:

First. "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. Ed. 77, 87; *Martin v. Pittsburg & L. E. R. Co.*, 203 U. S. 284, 294, 51 L. Ed. 184, 191, 27 Sup. Ct. 100, 8 A. & E. Ann. Cas. 87; *The Lottawanna*, 21 Wall. (U. S.) 558, 577, 22 L. Ed. 654, 662; *Western Union*

Tel. Co. v. Commercial Milling Co., 218 U. S. 406, 417, 54 L. Ed. 1088, 31 Sup. Ct. 59.

Second. The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution. *Lottery Case*, 188 U. S. 321, 353, 355, 47 L. Ed. 492, 500, 501, 23 Sup. Ct. 321, 13 A. & E. Ann. Cas. 561; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 203, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. 164.

We are not unmindful that that end was being measurably attained through the remedial legislation of the several States, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. *The Lottawanna*, 21 Wall. (U. S.) 558, 581-582, 22 L. Ed. 654, 664; *Baltimore & Ohio R. Co. v. Baugh*, 149 U. S. 368, 378-379, 37 L. Ed. 772, 13 Sup. Ct. 914.

The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in *Southern Railway Co. v. United States*, 222 U. S. 20, 27, 3 N. C. C. A. 822, 32 Sup. Ct. 2, that power is plenary and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present Act, unlike the one condemned in *Employers' Liability Cases*, 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141, deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce. And this being so, it is not a valid objection that the Act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that

commerce as if the negligent employee were also engaged therein.

Next in order is the objection that the provision in § 5, declaring void any contract, rule, regulation or device, the purpose or intent of which is to enable a carrier to exempt itself from the liability which the Act creates, is repugnant to the Fifth Amendment to the Constitution as an unwarranted interference with the liberty of contract. But of this it suffices to say, in view of our recent decisions in *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U. S. 549, 55 L. Ed. 328, 31 Sup. Ct. 259; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7, and *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621, that if Congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation or device in evasion of it.

Coming to the question of classification, it is true that the liability which the Act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit of all employees of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains or to hazards that differ from those to which other employees in such commerce, not within the Act, are exposed. But it does not follow that this classification is violative of the "due process of law" clause of the Fifth Amendment. Even if it be assumed that that clause is equivalent to the "equal protection of the laws" clause of the Fourteenth Amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary. *Lindsley v. Carbonic Gas Co.*, 220 U. S. 61, 78, 55 L. Ed. 369, 377, 31 Sup. Ct. 337. Tested by these standards, this classification is not objectionable. Like classifications of railroad carriers and employees for like purposes, when assailed under the equal protection clause, have been sustained by repeated decisions of this court. *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205, 32 L. Ed. 107, 8 Sup. Ct. 1161; *Louisville & Nashville R. Co. v. Melton*, 218 U. S. 36, 54 L. Ed. 921, 30 Sup. Ct. 676; *Mobile, Jackson & Kansas City R. Co. v. Turnipseed*, 219 U. S. 35, 55 L. Ed. 78, 31 Sup. Ct. 136, 32 L. R. A. (N. S.) 226.

It follows that the answer to the second of the questions before stated must be that Congress has not exceeded its power by prescribing the regulations embodied in the present Act.

The third question, whether those regulations supersede the laws of the States in so far as the latter cover the same field, finds its answer in the following extracts from the opinion of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579:

(p. 405) "If any one proposition could command the universal assent of mankind, we might expect it would be this:—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all: it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it, by saying 'this Constitution, and the laws of the United States, which shall be made in pursuance thereof shall be the supreme law of the land,' and by requiring that the members of the State Legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any State, to the contrary notwithstanding.'

(p. 426) "This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States, and cannot be controlled by them."

And particularly apposite is the repetition of the principle in *Smith v. Alabama*, 124 U. S. 465, 473, 31 L. Ed. 508, 510, 8 Sup. Ct. 564, 1 Interst. Com. Rep. 564:

"The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

True, prior to the present Act the laws of the several States were

regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *Smith v. Alabama*, 124 U. S. 465, 473, 480, 482, 31 L. Ed. 508, 8 Sup. Ct. 564, 1 Interst. Com. Rep. 804; *Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 99, 9 Sup. Ct. 28, 32 L. Ed. 352, 2 Interst. Com. Rep. 238; *Reid v. Colorado*, 187 U. S. 137, 146, 47 L. Ed. 108, 23 Sup. Ct. 92. The inaction of Congress, however, in no wise affected its power over the subject. *The Lottawanna*, 21 Wall. (U. S.) 558, 581, 22 L. Ed. 654, 664; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215, 5 Sup. Ct. 826, 29 L. Ed. 158, 1 Interst. Com. Rep. 382. And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. *Gulf, Colorado & Santa Fe Ry. Co. v. Hefley*, 158 U. S. 98, 104, 15 Sup. Ct. 802, 39 L. Ed. 910; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 56 L. Ed. 140, 32 Sup. Ct. 140; *Northern Pac. Ry. Co. v. Washington*, 222 U. S. 370, 56 L. Ed. 160, 32 Sup. Ct. 160.

We come next to consider whether rights arising under the Congressional Act may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion. The first of the cases now before us was begun in one of the Superior Courts of the State of Connecticut, and, in that case, the Supreme Court of Errors of the State answered the question in the negative. That, however, was not because the ordinary jurisdiction of the Superior Courts, as defined by the Constitution and laws of the State, was deemed inadequate or not adapted to the adjudication of such a case, but because the Supreme Court of Errors was of opinion (1) that the Congressional Act impliedly restricts the enforcement of the rights which it creates to the Federal Courts, and (2) that, if this be not so, the Superior Courts are at liberty to decline cognizance of actions to enforce rights arising under that Act, because (a) the policy manifested by it is not in accord with the policy of the State respecting the liability of employers to employees for injuries received by the latter while in the service of the former, and (b) it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standards of right established by the congressional Act and in others the different standards recognized by the laws of the State.

We are quite unable to assent to the view that the enforcement of the rights which the congressional Act creates was originally intended to be restricted to the Federal courts. The Act contains nothing which is suggestive of such a restriction, and in this situation the intention of Congress was reflected by the provision in the general jurisdictional Act, "That the circuit courts of the United States shall have original cognizance, *concurrent with the courts of the several States*, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, *and arising under the Constitution or laws of the United States.*" August 13, 1888, 25 Stat. 433, c. 866, § 1. *Robb v. Connolly*, 111 U. S. 624, 637, 28 L. Ed. 542, 4 Sup. Ct. 544; *United States v. Barnes*, 222 U. S. 513, 56 L. Ed. 117, 32 Sup. Ct. 117. This is emphasized by the amendment engrafted upon the original Act in 1910, to the effect that "The jurisdiction of the courts of the United States under this Act shall be *concurrent with that of the courts of the several States*, and no case arising under this Act and brought in any State court of competent jurisdiction shall be removed to any court of the United States." The amendment, as appears by its language, instead of granting jurisdiction to the State courts, presupposes that they already possessed it.

Because of some general observations in the opinion of the Supreme Court of Errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the Act of Congress and susceptible of adjudication according to the prevailing rules of procedure. We say "when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion," because we are advised by the decisions of the Supreme Court of Errors that the Superior Courts of the State are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that State, but also in cases where it arose in another State, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery, as where the causal negligence was that of a fellow-servant.

The suggestion that the Act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that Act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the Act had emanated from its own Legislature, and should be respected accordingly in the courts of the State. As was said by this court in *Claffin v. Houseman*, 93 U. S. 130, 136, 137, 23 L. Ed. 833:

"The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. If an Act of Congress gives a penalty [meaning civil and remedial] to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some Act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. * * * It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of *Ableman v. Booth*, 21 How. 506; and hence the State courts have no power to revise the action of the Federal courts nor the Federal the State, except where the Federal Constitution or laws are involved. But this is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

We are not disposed to believe that the exercise of jurisdiction by the State courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise

may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases.

We conclude that rights arising under the Act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion.

In No. 289 several rulings in the progress of the cause, not covered by what already has been said, are called in question, but it suffices to say of them that they have been carefully considered, and that we find no reversible error in them.

In Nos. 170, 289 and 290 the judgments are affirmed, and in No. 120 the judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

**PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD CO.
v. SCHUBERT.**

[UNITED STATES SUPREME COURT, MAY 13, 1912.]

224 U. S. 603.

1. Master and Servant—Relief Fund—Power of Congress.

Congress has power to provide that the acceptance by an injured employee of benefits from a "Relief Fund" shall not operate as a bar to the recovery of damages and to declare that any agreement to that effect shall be void.

2. Master and Servant—Employer's Liability Act—Construction of Statute.

The provision of the Employer's Liability Act of April 22, 1908, c. 149 (35 Stat. 65) § 5, "that any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability" created by the Act, shall to that extent be void, includes within its condemnation a contract of membership in a relief department stipulating that the acceptance of benefits under the contract shall be equivalent to a release from liability; especially in view of the proviso in § 5 permitting a set-off, in an action brought against a common carrier by an injured employee, of any sum the company has contributed toward any benefit paid to the employee

3. Master and Servant—Employer's Liability Act—Construction of Statute.

The provision of the Employer's Liability Act of April 22, 1908, c. 149 (35 Stat. 65) § 5, declaring void any contract or regulation, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the Act, applies as well to existing, as to future contracts and regulations of the described character.

4. Master and Servant—Employer's Liability Act—Abrogation of Existing Contracts.

It is within the power of Congress, in establishing rules of liability of interstate carriers for injuries sustained by employees in the course of their service, to invalidate existing contracts between carriers and their employees stipulating for an exemption of liability in consideration of acceptance of benefits from a "Relief Fund."

Error to the Court of Appeals of the District of Columbia to review a judgment (36 App. D. C. 565), rendered in favor of plaintiff in an action brought to recover damages for personal injuries, in which the construction of section 5 of the Employers' Liability Act of 1908 was involved. Affirmed.

NOTE.

On the subject of Acceptance of Benefits from a Railroad Relief Department as a Bar to an Action to Recover for Injuries, and the Validity of Stat-

utes Abrogating such Contracts, see MILLER v. ATLANTIC COAST LINE R. R. Co. (S. C. 1911), reported in this volume of Negligence and Compensation Cases Annotated (1 N. C. C. A.) p. 147, ante.

For plaintiff in error—Frederic D. McKenney, John Spalding Flannery, and William Hitz.

For defendant in error—John A. Kratz, Jr., M. J. Fulton, and Joseph W. Cox.

MR. JUSTICE HUGHES. This action was brought by Schubert, the defendant in error, against the Philadelphia, Baltimore and Washington Railroad Company to recover damages for personal injuries.

He received the injuries on May 13, 1908, while in its service as a brakeman within the District, and they were due to the negligence of a fellow-servant.

The company pleaded the general issue and in addition filed a special plea that Schubert was at the time a member of its "Relief Fund" under a contract of membership made in 1905, in which it was agreed that the company should apply as a voluntary contribution from his wages \$2.10 a month for the purpose of securing the benefits described in certain regulations. These contributions continued from October 18, 1905, to May 13, 1908, the date of the accident. Among the regulations, by which he agreed to be bound, was the following:

"58. Should a member or his legal representative make claim, or bring suit, against the company, or against any other corporation which may be at the time associated therewith in administration of the Relief Departments, in accordance with the terms set forth in Regulation No. 6, for damages on account of injury or death of such member, payment of benefits from the Relief Fund on account of the same, shall not be made, until such claim shall be withdrawn or suit discontinued. Any compromise of such claim or suit, or judgment in such suit, shall preclude any claim upon the Relief Fund for benefits on account of such injury or death, and the acceptance of benefits from the Relief Fund by a member or his beneficiary or beneficiaries, on account of injury or death, shall operate as a release and satisfaction of all claims against the company, and any and all of the corporations associated therewith in the administration of their Relief Departments, for damages arising from such injury or death."

A stipulation that the acceptance of benefits should constitute a release from all claims for damages was also incorporated in the application for membership.

The plea further set forth that the Relief Fund was formed by voluntary contributions from the employees of the defendant company and other companies in association with it for the purpose, appropriations

by the company whenever necessary to make up any deficit, the income or profit derived from investments of the moneys of the fund and such gifts or legacies as might be made for its use. The companies took general charge of the department, guaranteed the fulfillment of its obligations, became responsible for the safekeeping of its funds, supplied the necessary facilities for conducting the business of the department and paid all its operating expenses. On December 31, 1908, the total number of employees of the defendant company was 8458, of which 6909 were members of the "Relief Fund"; during the year 1908 the company contributed as the cost of administration the sum of \$21,557.02, and during the period of the plaintiff's membership its total contribution for this purpose was \$57,610.51. In addition, the company furnished the facilities of its mail, express and telegraph departments free of charge.

It was also alleged that after his injury Schubert (between June, 1908, and August, 1908) had voluntarily accepted benefits amounting to \$79; that he had subsequently presented his claim for damages, in view of which no further payments were made, and that the acceptance of the benefits above mentioned was a bar to his action.

The court sustained a demurrer to the special plea and Schubert recovered judgment for \$7,500, which was affirmed by the Court of Appeals.

The questions presented by the assignments of error relate to the validity of the Employers' Liability Act of April 22, 1908, c. 149 (35 Stat. 65), under which the action was maintained; and particularly, both to the applicability, and to the validity, if applicable, of § 5 of that Act, upon which the court below based its ruling as to the insufficiency of the special plea.

That Congress did not exceed its power, in imposing the liability defined by the statute, has been decided by this court. *Second Employers' Liability Cases*, 223 U. S. 1, 1 N. C. C. A. 875, 32 Sup. Ct. 125, 56 L. Ed. 169. Section 5 provides:

"That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

With respect to this section, the court said in the case cited: "Next

in order is the objection that the provision in § 5, declaring void any contract, rule, regulation or device, the purpose or intent of which is to enable a carrier to exempt itself from the liability which the Act creates, is repugnant to the Fifth Amendment to the Constitution as an unwarranted interference with the liberty of contract. But of this it suffices to say, in view of our recent decisions in *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7, and *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621, that if Congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation or device in evasion of it." *Second Employers' Liability Cases*, *supra*, p. 52.

In *Chicago, B. & Q. R. Co. v. McGuire*, *supra*, the court had before it the amendment, made in 1898 (March 8, 1898, Laws of 1898, c. 49, p. 33), of § 2071 of the Code of Iowa. This section, in the cases within its purview, abrogated the fellow-servant rule and the amendment provided:

"Nor shall any contract of insurance, relief, benefit, or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such insurance relief, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives after the injury, from such corporation, person, or association, constitute any bar or defense to any cause of action brought under the provisions of this section, but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to the injuries received."

It was held that the amendment was valid and hence that the defense based upon the acceptance of benefits could not be sustained. The court said (pp. 564, 572): "Neither the suggested excellence nor the alleged defects of a particular scheme may be permitted to determine the validity of the statute, which is general in its application. Its provision that contracts of insurance relief, benefit, or indemnity, and the acceptance of such benefits, should not defeat recovery under the statute, was incidental to the regulation it was intended to enforce. Assuming the right of enforcement, the authority to enact this inhibition cannot be denied. If the Legislature had the power to prohibit contracts limiting the liability imposed, it certainly

could include in the prohibition stipulations of that sort in contracts of insurance relief, benefit or indemnity, as well as in other agreements. It does not aid the argument to describe the defense as one of accord and satisfaction. The payment of benefits is the performance of the promise to pay contained in the contract of membership. If the Legislature may prohibit the acceptance of the promise as a substitution for the statutory liability, it should also be able to prevent the like substitution of its performance."

Upon similar grounds, Congress had the power to enforce the regulations validly prescribed by the Act of 1908 by preventing the acceptance of benefits under such relief contracts from operating as a bar to the recovery of damages and by avoiding any agreement to that effect. The question is whether this power has been exercised; that is, whether the stipulation of the contract of membership asserted in defense comes within the interdiction of § 5. The former Act of June 11, 1906, c. 3073 (34 Stat. 232), which was valid as to employees engaged in commerce within the District of Columbia (*Hyde v. Southern Ry. Co.*, 31 App. D. C. 466; *El Paso & N. E. Ry. Co. v. Gutierrez*, 215 U. S. 87, 97, 98, 30 Sup. Ct. 21, 54 L. Ed. 106, 111, contained explicit provision that such a contract or the acceptance of benefits thereunder should not defeat the action. Section 3 of that Act was as follows:

"That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: *Provided*, however, that upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative."

But it is urged that the substituted provision—of § 5 of the Act of 1908—failed to embrace that which the earlier Act specifically described. We cannot assent to this view. The evident purpose of Congress was to enlarge the scope of the section and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act." It includes every variety of agreement or arrangement

of this nature; and stipulations, contained in contracts of membership in relief departments, that the acceptance of terms thereunder shall bar recovery, are within its terms. The statute provides that "every common carrier by railroad in the District of Columbia shall be liable in damages to any person suffering injury while he is employed by such carrier resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." That is the liability which the Act defines and which this action is brought to enforce. It is to defeat that liability for the damages sustained by Schubert which otherwise the company would be bound under the statute to pay, that it relies upon his contract of membership in the relief fund and upon the regulation which was a part of it. But for the stipulation in that contract, the company must pay; and if the stipulation be upheld, the company is discharged from liability. The conclusion cannot be escaped that such an agreement is one for immunity in the described event, and as such it falls under the condemnation of the statute.

If there could be doubt upon this point, it would be resolved by a consideration of the proviso of § 5, which immediately follows the language condemning contracts, rules, regulations, or devices, the purpose of which is to exempt the carrier from liability. It is: "*Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.*" The practice of maintaining relief departments, which had been extensively adopted and of including in the contract of membership provision for release from liability to employees who accepted benefits, was well known to Congress, as is shown by § 3 of the Act of 1906. On specifically providing in that section that neither such contracts, nor their performance, should be a bar to recovery, Congress inserted a proviso permitting a set-off of any sum the company had contributed toward any benefit paid to the employee. When in the Act of 1908 it enlarged the scope of the clause defining the contracts and arrangements for indemnity which should not prevail, Congress retained the proviso in terms substantially the same. This clearly indicates the intent to include within the statute stipulations which made the acceptance of benefits under contracts of membership in relief departments equivalent to a

release from liability. Unless the liability survived the acceptance of benefits, there could be no recovery and hence no occasion for set-off.

It is also insisted that the statute does not cover the agreement in this case, as it was made before the statute was enacted. But that the provisions of § 5 were intended to apply as well to existing, as to future, contracts and regulations of the described character cannot be doubted. The words, "the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act," do not refer simply to an actual intent of the parties to circumvent the statute. The "purpose or intent" of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view.

Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority.

In speaking of the Act in question, this court said that "the natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged," there was no doubt that "in making those changes Congress acted within the limits of the discretion confided to it by the Constitution." *Second Employers' Liability Cases*, *supra*, p. 50. [223 U. S. 51, 32 Sup. Ct. Rep. 175, 56 L. Ed. 169]. If Congress may compel the use

of safety appliances (*Johnson v. Southern Pac. Co.*, 196 U. S. 1, 17 Am. Neg. Rep. 412, 25 Sup. Ct. 158, 49 L. Ed. 363), or fix the hours of service of employees (*Balt. & O. R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878), its declared will, within its domain, is not to be thwarted by any previous stipulation to dispense with the one or to extend the other. And so, when it decides to protect the safety of employees by establishing rules of liability of carriers for injuries sustained in the course of their service, it may make the rules uniformly effective. These principles, and the authorities which sustain them, have been so lately reviewed by this court that extended discussion is unnecessary. *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. 265.

In that case it appeared that in 1871, in settlement of a claim for damages for personal injuries, the plaintiffs had entered into an agreement with the railroad company by which the latter promised that during their lives they should have free passes upon the railroad and its branches. It was held that the company rightfully refused, after the passage of the Act of June 29, 1906, 34 Stat. 584, c. 3591, further to comply with the agreement, and that a decree requiring the continued performance of its provisions was erroneous. The ground for this conclusion was thus stated (pp. 482-486): "The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist. * * * After the Commerce Act came into effect no contract that was inconsistent with the regulations established by the Act of Congress could be enforced in any court. The rule upon this subject is thoroughly established. * * * If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived." See also *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 228, 44 L. Ed. 136; *Armour Packing Co. v. United States*,

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209 U. S. 56; *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164.

We find no error in the rulings of which the plaintiff in error complains, and the judgment of the court below is therefore affirmed.

GREAT NORTHERN EXPRESS CO. v. NATIONAL SURETY CO.

[SUPREME COURT OF MINNESOTA, JANUARY 6, 1911.]

113 Minn. 162.

Insurance—Indemnity—Culpable Negligence of Employee—Construction of the Contract—Action—Evidence.

Action on defendant's bond, whereby it promised to indemnify the plaintiff for any loss sustained by the culpable negligence of its express messenger, in connection with the duties pertaining to the position, which term was defined by the bond to mean a failure to exercise the degree of care which men of ordinary prudence usually exercise in regard to their own affairs. The alleged breach of the bond was the negligence of the messenger in failing to keep the doors of his express car chained on the inside, which enabled robbers to enter the car, overpower him, and to steal from the car \$5,000. Verdict for defendant. *Held*:

(1) The negligence of the messenger, which would render the defendant liable, would be a failure on his part to exercise, in connection with the duties of his position, that degree of care which men of ordinary prudence usually exercise in regard to their own affairs of like gravity.

(2) The bond defines the standard of care to be exercised by the messenger, which the plaintiff could not enlarge, as against the defendant, by establishing rules for the conduct of its business; but a rule making it the duty of the messenger to keep the car doors chained was admissible in evidence for the purpose of showing what were the duties pertaining to his position.

(3) The mere fact that the messenger failed to chain the doors, if he did so, did not, as a matter of law, render the defendant liable; for it was a question for the jury whether, under all the facts which the evidence tended to show, he omitted to do anything in connection with the duties pertaining to his position which a man of ordinary prudence would usually do in his own affairs of like importance.

[Headnote by the Court.]

Appeal by plaintiff from a judgment of the District Court of Ramsey County, rendered in an action brought to recover upon a bond indemnifying plaintiff against loss caused by the culpable negligence of its employee. **Reversed.**

NOTE.**Construction of Instrument Indemnifying Employer Against Loss From Negligence of Employee.**

In *UNITED STATES FIDELITY & GUARANTY CO. v. DES MOINES NAT. BANK*, 145 Fed. 273, 74 C. C. A. 553 (1906), the bond which was the basis of the action provided that the company should not be liable "for any loss occasioned by mistake, accident, error in judgment, on the part of any em-

ployee, or any robbery, unless by or with the connivance or culpable negligence of the employee." The term "culpable negligence" was defined in the contract to mean "failure to exercise that high degree of care and caution which men of ordinary prudence and intelligence usually exercise in regard to their own affairs." The court construed this language as not requiring the exercise by the employee of the very highest or an extraordinary degree of care and caution.

For appellant—M. L. Countryman.

For respondent—How, Butler & Mitchell.

START, C. J. Action in the district court of the county of Ramsey to recover \$5,000, upon defendant's bond to plaintiff indemnifying it against loss by the culpable negligence of certain of its employees, of whom its express messenger, Joseph E. Perrine, was one. Verdict for the defendant. Appeal by the plaintiff from an order denying its motion for a new trial.

In the bond the plaintiff was designated as the employer, and thereby the defendant agreed to make good and reimburse the plaintiff any and "all pecuniary loss of money, securities, or other personal property belonging to the employer or in its possession as a common carrier, bailee, or warehouseman, sustained by the employer by or through the personal dishonesty or culpable negligence of any employee, for whom the company is or shall have become surety hereunder, in connection with the duties pertaining to the position to which he has been or may be appointed by the employer, and for which the employee shall be legally liable to the employer. * * * The company shall not be liable * * * for any loss occasioned * * * by robbery, unless by or with the connivance or culpable negligence of the employee; and 'culpable negligence,' as used in this bond, shall be taken and held to mean failure to exercise that degree of care and caution which men of ordinary prudence and intelligence usually exercise in regard to their own affairs."

The alleged breach of the bond is based upon the facts following: On May 12, 1908, the plaintiff delivered to its messenger, Perrine, then in charge of its express car, a package of money amounting to \$5,000, which was to be carried in the car from Seattle to Mt. Vernon, Wash. While the money was so in his possession, armed robbers entered the express car, overcame and bound him and then stole the money, which was never recovered, and the plaintiff paid the amount thereof to the owner. On each side of the express car was a sliding door, which could be fastened from the inside by a hasp and chain. At its end was a door opening into the car from the platform. This door was provided with a lock, and with a chain fastened on the inside, by means of which, when the chain was fastened in place, the door could be opened only about three inches, so that a person from the outside could not unfasten the chain. The express messenger by these appliances could lock himself and money in his charge in, so that no one could enter the car, except by violence. The alleged

negligence was that the messenger failed to keep the end door of the car chained, that it was his duty to keep the door chained, and that by reason of his failure to discharge his duty the robbers were enabled to enter the car and steal the money. This the defendant denied.

On the trial the plaintiff, for the purpose of showing what the duty of the messenger was with reference to keeping the doors of the car chained, offered in evidence this rule: "Chain fasteners must at all times be applied to door, except when opened for purpose of receiving or delivering express matter. When the train stops between stations, or at places where there are no agents, the door should never be opened, except as occasion demands, and then only the chain length, until you are satisfied everything is all right." A foundation for the admission of the rule was shown, and there was evidence tending to show that the car door was not, at the time the robbers entered, chained. The trial judge sustained the defendant's objection to the admission of the rule, and it was excluded. In this connection he instructed the jury to this effect: Culpable negligence as used in this bond the parties have stipulated shall be taken to mean failure to exercise that degree of care and caution which men of ordinary prudence and intelligence usually exercise in regard to their own affairs. This is the standard of judgment which the parties have adopted for themselves, and for that reason I rejected the offer of the plaintiff to show certain rules of the plaintiff with respect to its messengers, because these people are entitled to be tried by the standard that they themselves have set up and agreed to. The exclusion of the rule and the giving of the instruction are each assigned as error.

The pivotal question is whether the exclusion of the rule in connection with the instruction was reversible error. The negligence of the messenger, as defined by the bond, which, if followed by loss to the plaintiff, would render the defendant liable therefor, would be a failure on his part to exercise, in connection with the duties pertaining to his position, that degree of care and caution which men of ordinary prudence and intelligence usually exercise in regard to their own affairs of *relative gravity*. The words we have italicized are not found in the bond, but they are necessarily implied, for the degree of care exercised by men of ordinary prudence in their own affairs depends upon the importance of the matter in hand.

The first contention of the defendant is, in effect, that the rule was properly excluded for the reason that the parties to the bond thereby expressly defined the standard of care to be exercised by the messenger, and that the plaintiff, by establishing rules for the conduct of its business, could not, as against the defendant, enlarge the stipula-

ted degree of care. This must be conceded, but it does not follow that the rule was rightly excluded; for the primary question is whether the messenger, in connection with the duties pertaining to his position, exercised that degree of care which men of ordinary prudence would exercise in their own affairs of like importance. That he did not exercise this degree of care in connection with his duties was a proposition the plaintiff was bound to establish. While it could not, by arbitrary and unreasonable rules, affect the contract liability of the defendant, yet it was both competent and necessary for the plaintiff to show what were the duties of the messenger in connection with his position; otherwise, the jury would have no intelligent basis for determining the question of his alleged negligence. Whatever may have been true as to other rules offered in evidence, the one to which we have referred was neither arbitrary nor unreasonable, but a clear, concise, and reasonable statement of the messenger's duties with reference to keeping the doors of the car safeguarded by the chain fasteners. We are therefore of the opinion that it was error not to receive this particular rule in evidence, for the purpose of showing what duties pertained to the messenger's position.

It is quite obvious that the case of *Fonda v. City Ry. Co.*, 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341, is not here in point, for the reason that the plaintiff in that case was a traveler on the public streets, between whom and the defendant there were no contractual relations, and therefore it necessarily followed that the defendant's private rules for the guidance of its employees in the discharge of their duties were not admissible in evidence for or against either party, for they could only fix a standard of duty as between itself and its employees. In this case, however, there were contractual relations between the parties, whereby the defendant undertook to indemnify the plaintiff against loss by reason of the negligence of the messenger in connection with the duties pertaining to his position. The purpose of offering the rule in evidence as to such duties was not to enlarge the defendant's liability on its bond, but to advise the jury what his duties in the premises were, so that they might determine whether he was negligent in that connection; that is, determine whether he omitted to do anything in connection with his duties which a man of ordinary prudence would have done in his own affairs of like importance.

It is also contended that, even if it were error to exclude the rule, it was not reversible error, for the reason that the oral evidence on the part of the defendant tended to show what the duties of the messenger were with reference to keeping the doors of the car chained.

The record discloses evidence of this character, and except for the instruction of the court, which is here assigned as error, we should be inclined to yield to the contention in this respect. The tendency of the instruction, in connection with the rejection of the rule, was to impress the jury that any evidence, oral or documentary, as to the messenger's duties, was unimportant, and, in the judgment of the trial judge, immaterial. The exclusion of the rule and the instruction, considered together, as they must be, constitute prejudicial error.

One other assignment of error must be disposed of in view of another trial. The trial court refused to give the requested instruction: "If the jury find from the evidence that the express messenger did not fasten the chain of this door on the day in question, it is negligence within the meaning of the contract sued upon, which directly contributed to cause the loss, and that their verdict must be for the plaintiff, for the full amount sued on. * * *" This was properly refused, for it makes the entire case turn upon the question whether the messenger did or did not chain the car door. If he failed to chain the car door, then, as we have suggested, it was a question of fact for the jury, under all the facts disclosed by the evidence, whether such omission was negligence on his part within the meaning of the contract as we have defined it.

Order reversed, and a new trial granted.

WALSH v. SCHMIDT.

[SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER 7, 1910.]

206 Mass. 405.

1. Landlord and Tenant—Duty of Landlord—Condition of Premises.

A landlord is under no implied contract or duty to keep premises in a safe condition while they are in the possession of a tenant.

2. Landlord and Tenant—Warranty—Condition of Premises.

There is no implied warranty that a house or piazza floor is safe and fit for occupancy at the time of demise, the doctrine of *caveat emptor* being applicable.

3. Landlord and Tenant—Warranty—Opinion—Injuries.

A landlord's statement to a prospective tenant that the house "was good, safe and fit to live in," is merely an expression of an opinion, and cannot be made the basis of an action for damages for personal injuries caused by falling through a rotten floor in a back piazza of the leased premises.

4. Landlord and Tenant—Injury to Tenant—Warranty—Evidence.

In an action brought against a landlord to recover damages for injuries sustained by a tenant, caused by the breaking through of the floor in a back piazza while the tenant's wife was washing windows, evidence held to be insufficient to show an express warranty of soundness and strength by the landlord.

Appeal by defendant from a judgment in favor of plaintiff in an action brought to recover damages for personal injuries sustained by the breaking through of a piazza floor. Affirmed.

KNOWLTON, C. J. This is an action of tort, to recover for personal injuries received by the plaintiff while standing upon a chair on the back piazza of a dwelling house, washing a window. One leg of the chair broke through the floor near the wall of the building, and the plaintiff fell. The defendant was the owner of the house which the plaintiff's husband occupied as his tenant. The declaration is for negligence of the defendant in allowing the floor to become rotten and defective. The plaintiff and her husband and his family had lived in the house about five months at the time of the accident. The question before us is whether there was evidence on which the plaintiff could recover

NOTE.

On the subject of Liability of Landlord for Dangerous and Defective Condition of Premises, see notes in 7 Am. Neg. Rep. 260, 437, 608; 8 Am.

Neg. Rep. 6; 9 Am. Neg. Rep. 560, 566.

And on the subject of Liability of Landlord for Falling off Porch Causing Injury to Wife of Tenant, see note in 17 Am. Neg. Rep. 54.

It is plain that there was no implied contract or duty on the part of the defendant to keep the premises in a safe condition while they were in possession of the tenant. *Galvin v. Beals*, 187 Mass. 250, 17 Am. Neg. Rep. 550, 72 N. E. 969; *Miles v. Janvrin*, 196 Mass. 431, 82 N. E. 708, 13 L. R. A. (N. S.) 378, 124 Am. St. Rep. 575; s. c. 200 Mass. 514, 86 N. E. 785. There was no allegation or evidence that there was any fraud on the part of the defendant or any liability for the concealment of a dangerous condition of which he had knowledge. *Clogston v. Martin*, 182 Mass. 469, 16 Am. Neg. Rep. 462, 65 N. E. 839; *Booth v. Merriam*, 155 Mass. 521, 30 N. E. 85; *O'Malley v. Twenty-Five Associates*, 178 Mass. 555, 60 N. E. 387. Indeed, the evidence tended to show, not only that the defendant had no knowledge that the floor was not safe at the time of the letting, but that there was nothing in the appearance of it to indicate that it was unsafe.

There was no implied warranty that the house or the piazza floor was safe and fit for occupancy at the time of the letting. *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Booth v. Merriam*, 155 Mass. 521, 30 N. E. 85; *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465.

In the plaintiff's declaration there is an averment "that the defendant expressly warranted the premises to be fit and safe for the occupation of the plaintiff's husband and family." The claim of a right to recover upon this averment presents the only question in the case which is in the least doubtful. Unless there was an express warranty covering the condition which caused the accident, it is plain that there is no cause of action. The testimony of the plaintiff on this point was that the defendant "said he fixed the house all right. It was fit for anybody to live in it." This was before the contract of hiring was made. She testified that he "said he would fix it up to live in—fix it up in good shape." "My husband asked him what kind of a house it was, if it was all right. He said 'Yes.' * * * He said it be all right and a good place to live in. He kept talking to my husband. I did not pay any attention." The testimony of the plaintiff's husband was of similar purport. It appeared that both the plaintiff and her husband looked over the house and examined it as much as they chose. They passed over this piazza several times a day during the five months before the accident. The condition of the floor could have been as easily discovered at any time by the plaintiff or her husband as by the defendant. The floor was open to inspection from below as well as from above. Neither

the plaintiff nor her husband ever complained to the defendant of the condition of the floor.

The rule of *caveat emptor* applies to the purchase and hiring of real estate, and the question before us is whether this testimony, having reference to the subject and nature of the conversation between the parties, would warrant a finding that the defendant expressly warranted the house to be in perfect condition in all its parts, so that no accident could happen through any imperfection in it, from any proper use that could be made of it. We are of opinion that it would not. The statement was that the house was good, safe and fit to live in. This was of the most general character. It was in the nature of representation and recommendation, or "dealer's talk," which should be treated as the expression of an opinion about the effect of conditions which in general were open and obvious, rather than as a warranty as to the details of construction or soundness. As to these matters the plaintiff and her husband could observe and judge as well as he could. It is not to be supposed that they took the house, relying upon these representations as express stipulations in a contract which made the relations of the parties in this respect entirely different from those of ordinary landlords and tenants. We are of opinion that the jury were not warranted in finding that there was an express warranty of the soundness and strength of every part of the house, including the floor of the piazza, to such a degree that it would not give way in any place under circumstances of peculiar and unusual strain upon it.

Another question, which has not been argued, is whether, if there were an express warranty in the contract with the plaintiff's husband, this plaintiff could maintain an action of tort under a contract to which she was not a party, for an accident that occurred five months afterwards, when the defendant was under no legal obligation to keep the premises in repair. The case differs materially from *Farrell v. Manhattan Market Co.*, 198 Mass. 271-274, 21 Am. Neg. Rep. 142, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436. Upon this part of the case we express no opinion.

The exceptions must be sustained, and under St. 1909, c. 236, the entry must be: Judgment for the defendant.

CITY OF RADFORD V. CLARK.

[SUPREME COURT OF APPEALS OF VIRGINIA, JANUARY 25, 1912.]

113 Va. 199.

1. Municipal Corporations—Personal Injuries—Blasting.

A municipal corporation, although not authorized by its charter or the general laws of the State to operate a rock quarry within its corporate limits, is not liable to a traveler injured when her horse took fright at blasts set off by agents of the city in a quarry near the highway, where rock was being obtained for use on the streets.

2. Highways—Blasting—Defect.

Blasting conducted by municipal employees in a rock quarry located 65 feet from a street, is not a defect in the highway.

3. Municipal Corporations—Blasting—Fright of Horse—Injury.

The fact that a municipality permitted its employees to discharge blasts in such a manner as to constitute a public nuisance, in a rock quarry, located 65 feet from the highway, does not render it liable to a traveler who was injured in consequence of her horse taking fright at a succession of blasts, where the blasting was not done in the performance of a duty imposed upon the municipality by law.

4. Municipal Corporations—Ordinance—Blasting on Private Property.

A city cannot be held liable for its failure to pass an ordinance to prevent or safeguard the firing of blasts in a rock quarry 65 feet from its streets and upon private property.

5. Appeal—Demurrer—Final Judgment.

The Supreme Court of Appeals, on reversing the judgment of the Circuit Court and sustaining a demurrer to the declaration, will enter a final judgment where, on the presumption that the plaintiff made the strongest presentation of her case which the facts permit, it could not be bettered if leave were given to amend.

Error to the Circuit Court of Montgomery County, to review a judgment rendered in favor of plaintiff in an action brought to recover damages caused by her horse taking fright at a succession of blasts set off by defendant in a quarry located near a public street. Reversed.

NOTE.

On the subject of Liability for Damages Caused by Blasting, see notes in 7 Am. Neg. Rep. 484; 11 Am. Neg. Rep. 170.

And on the subject of Liability of Municipal Corporation for Horses

Taking Fright at Noises, see notes in 6 Am. Neg. Rep. 84; 21 Am. Neg. Rep. 445.

And on the subject of Liability of Municipal Corporation for Personal Injuries, see note in 12 Am. Neg. Rep. 84.

For plaintiff in error—Harless & Colhoun, and H. C. Tyler.

For defendant in error—Longley & Jordan.

CARDWELL, J. The declaration in this action, brought by Mrs. Mollie P. Clark against the city of Radford, consists of five counts, which, after setting out that the defendant is a municipal corporation chartered by the Legislature of Virginia, and charged with the duty of keeping its streets in a reasonably safe condition for use of the public, alleges that said defendant city was on the ——— day of September, 1909, through its servants and agents, blasting with powder and other explosive material in, and getting out rock for use on its streets from a rock quarry, at a distance of 65 feet from a street of the city known as Grove avenue, and that, while the city was so engaged in blasting on the date named, the plaintiff was driving along said street and within 75 feet of the point of the blasting, and without knowledge thereof on her part, when a succession of blasts were set off, frightening her horse, causing it to become unmanageable and suddenly to wheel around in the street, throwing plaintiff violently upon the ground, whereby she was seriously injured, and her buggy and harness destroyed.

The neglect of the city to perform its duty of keeping its streets, and particularly Grove avenue, in reasonably safe condition for the use of travelers thereon, is alleged in the five counts in plaintiff's declaration as follows: The first count charges a failure to give warning of its intention to put off the blasts; the second charges a failure on the part of the city to cover its blasts; the third charges the employment by the city of unskillful, careless, and negligent servants; the fourth merely alleges damages to the buggy and harness; and the fifth combines the negligence alleged in the first, second and third counts and practically charges negligence on the part of the city in maintaining or failing to prevent a nuisance, resulting in injury to the plaintiff.

The defendant city demurred in writing to the declaration and each count thereof, which demurrer was by the court overruled, whereupon the plea of not guilty was entered and issue joined; and at a subsequent term of the court a trial by jury was had, resulting in a verdict and judgment against the city for \$500 damages in favor of the plaintiff with interests and costs, to which judgment this writ of error was awarded.

Of the eight assignments of error, we find it necessary to consider

only the first, which is to the ruling of the court upon the demurrer to the declaration.

"In order to render a municipal corporation liable in damages for the torts of its agents and employees, it is necessary, among other things, that the injury complained of be caused by, or result from, an act done in the exercise of some power conferred upon it by its charter or other positive enactment." *Duncan v. City of Lynchburg*, 34 S. E. 964, 48 L. R. A. 331; *Donable's Adm'r v. Town of Harrisonburg*, 104 Va. 533, 52 S. E. 174, 2 L. R. A. (N. S.) 910, 113 Am. St. Rep. 1056, and authorities cited in those cases.

In the first of the cases just cited the opinion by Buchanan, J., defines what powers, under the settled law, a municipal corporation can exercise and none other, and it was there held that the city of Lynchburg, either under its charter provisions or the general law relating to such corporations, had no power or authority to create and maintain a nuisance resulting from the operation of a rock quarry outside of the city's limits, although the rock quarried was for use in the construction and maintenance of roads which the city was authorized to construct and maintain, the nuisance complained of having been created and continued by the agents or employees of the city while engaged in a work which was without its corporate powers.

In *Donable v. Harrisonburg*, *supra*, the injury sued for resulted from the operation of a rock quarry, outside of the corporate limits of the town, the stone gotten out to be for use upon the streets of the town, but it was there also held that there could be no recovery for the injury, because the operation of the rock quarry was *ultra vires*, for the reasons (1) that neither the charter nor the general law gave the town authority to operate a rock quarry; and (2) because the operation of the quarry was carried on outside of the corporate limits.

It has been repeated in the authorities that it might be convenient and even profitable for a municipal corporation, in order to perform certain duties imposed upon it as such corporation to own and operate a rock quarry or other like undertakings, yet it has no power to do so unless in express words conferred in its charter or necessarily or fairly implied in or incidental to the powers expressly granted.

In this case, as in *Duncan v. Lynchburg*, and *Donable v. Harrisonburg*, *supra*, to operate a rock quarry was neither necessary to, fairly implied in, nor incident to, the duty of the city of keeping its streets in a reasonably safe condition, nor essential to the declared objects and purposes of the corporation. We fail to see how a different rule or law is to be applied where the injury sued for resulted from an

unauthorized act of a municipality, done within its corporate limits, from that applied by this and other courts, as well as sanctioned by the ablest law writers, to cases in which the tort was committed outside of the corporate limits, for the tort committed either in the one or the other case flows from an *ultra vires* act.

Neither the charter or plaintiff in error, city of Radford, nor the general laws of the State, authorize the operation, either within or without its corporate limits, of a rock quarry.

It is contended for defendant in error that, although there is no allegation or complaint made in her declaration that the street on which she received her injuries was unsafe by any defect therein, she is nevertheless entitled to recover for her injuries because the street was made unsafe by the operation of the rock quarry located 65 feet therefrom.

The authorities very generally hold that noises outside of the limits of the highway, amounting to a public nuisance, are not a defect in the highway.

The allegation was made in the case of *Lincoln v. City of Boston*, 148 Mass. 578, 20 N. E. 329, 3 L. R. A. 257, 12 Am. St. Rep. 601, that on the day of the accident to the plaintiff cannon were fired in Boston Common, near Charles street, which rendered said street on which plaintiff was driving unsafe, and was a public nuisance, that the Common was owned and controlled by the city, upon which, by the mayor acting as its agent, the firing of the cannon was licensed; but the opinion of the court sustaining the demurrer to the declaration said: "Annoying and even dangerous as such firing may be, an adjoining householder could not maintain an action against the city, and the plaintiff stands no better than an adjoining owner would."

To the same effect is the opinion of the Supreme Court of Wisconsin in *Hubbell v. City of Viroqua*, 67 Wis. 343, 30 N. W. 847, 58 Am. Rep. 866, where the action was to recover damages for an injury received while passing along one of the streets of the city, caused by a ball of a gun fired from within a shooting gallery adjoining the sidewalk, but not within the boundaries of the street or sidewalk; the declaration charging that the operating of the shooting gallery, which was licensed by the city, was an obstruction to the free and safe travel of the public on and along a street. In the opinion of the court holding the city not liable, it is said: "The shooting gallery was neither in the street, nor within the boundaries of the sidewalk, but outside of the same, upon private property, and no more obstructed the sidewalk than any other building adjoining such walk."

In the case just cited, as in the case before us, the contention was

made that the city was liable because it knowingly permitted a public nuisance to exist in the city adjacent to a public street, which endangered persons traveling upon the street; but with respect to this contention, the court's opinion says: "An action will not lie against a municipal corporation for not suppressing a public nuisance within the municipality when such nuisance is not created nor maintained by the expressed authority of the municipality, and when such public nuisance is not the result of some act done, or neglected to be done, in the performance of a duty imposed upon the municipality by law, such as repair of streets, constructing sewers, water, or other public works, the municipal corporation is not liable for injuries caused to persons or property of the citizen by the criminal acts of individuals, unless made liable by statute."

The further contention of the learned counsel in this case that plaintiff in error is liable "for maintaining and not preventing a nuisance," resulting in injury to plaintiff, is equally without merit. Leaving out of view the fact that there is no allegation in the declaration, or in any count thereof, that plaintiff in error had knowledge, actual or constructive, of the unsafe condition of its streets, the operation or control of a rock quarry and blasting therein situated 65 feet or more from the street upon which defendant in error received her injuries was not a positive or ministerial duty, but a governmental, legislative, and discretionary duty for which the city (plaintiff in error) cannot be held liable. *Jones v. City of Williamsburg*, 97 Va. 722, 7 Am. Neg. Rep. 223, 34 S. E. 883, 47 L. R. A. 294, and authorities cited.

Conceding that the operation of the rock quarry complained of in this case was a nuisance, plaintiff in error created it without power or authority conferred upon it by its charter or other positive enactment, and it follows that it could not be held liable for not preventing the nuisance, since the alleged nuisance (the rock quarry) was 65 feet or more from the street, and not connected in any way with the physical construction of the street.

An examination of the cases cited for defendant in error discloses that they all practically deal with the question of a nuisance *per se*, such as the obstruction of the street itself by the erection of objects therein, as in *City of Richmond v. Smith*, 101 Va. 161, 13 Am. Neg. Rep. 465, 43 S. E. 345, and in like cases, or the carrying on of a dangerous business that no amount of care, reasonable foresight, or prudence could have safeguarded against, as were the facts appearing in *Wilson v. Phoenix Power Co.*, 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890. Neither those cases nor the line of cases to which

they respectively belong apply to the facts alleged in the declaration in this case.

The authorities cited above hold (1) that a city is not liable for its failure to pass ordinances prohibiting bicycle riding upon sidewalks, or coasting upon its streets (*Jones v. City of Williamsburg, supra*), or (2) the firing of cannon near a street, or (3) the firing of a gun in a shooting gallery licensed by the city to operate adjacent to and outside of a street, resulting in injury to a traveler upon the street; and it follows, necessarily, that a city cannot be held liable for its failure to pass an ordinance to prevent or safeguard the firing of blasts in a rock quarry 65 feet or more from its streets and upon private property. See, also, *Farrell v. Inhabitants, etc.*, 69 Me. 72, and cases cited.

For these reasons, we are of opinion that the demurrer to the declaration and each count thereof should have been sustained, and in view of the fact that it is to be presumed that defendant in error has made the strongest presentation of her case which the facts permit, and that it could not be bettered if leave were given to amend, this court, entering such judgment as the circuit court ought to have rendered, will sustain the demurrer and enter a final judgment for plaintiff in error.

Reversed.

WHITTLE, J., (dissenting). The following material facts are set out in the declaration: While the defendant in error, Mrs. Mollie P. Clark, was driving in her buggy along one of the streets of Radford, the employees of the city, without notice or warning of any kind, set off three uncovered blasts in a rock quarry operated by the city for the purpose of obtaining material with which to repair the streets. The quarry was situated inside the corporate limits and within 65 feet of the street, and was 75 feet from the point of accident. The noise from the explosions, together with the falling rocks in the street and upon the vehicle frightened the horse and caused it suddenly to turn and run away, overturning the buggy and inflicting upon the plaintiff the injury of which she complains.

These allegations were proved at the trial, and thereupon the jury awarded the plaintiff \$500 damages.

Upon the theory that the act of the city in thus operating the rock quarry was an *ultra vires* act, for which the municipality could not be held liable in damages, this court reversed the judgment of the trial court, and sustained the demurrer to the declaration.

In the two Virginia cases (*Duncan v. City of Lynchburg*, 34 S. E. 964, 48 L. R. A. 331, and *Donable v. Harrisonburg*, 104 Va. 533, 52

S. E. 174, 2 L. R. A. (N. S.) 910, 113 Am. St. Rep. 1056, relied on, in part, to sustain this ruling, the rock quarries in question were both located outside of the city limits, which fact seems to have exercised considerable influence with the court.

The charter of Radford and the general law impose upon the city the imperative duty of keeping its streets in reasonable repair; and I should be loath to hold that such grant of power and imposition of responsibility does not carry with it as a necessary and fairly to be implied incident the power to take rock and other needful material from its contiguous property, to enable the city to discharge that duty. It is matter of common knowledge that cities and towns throughout the country resort to such sources of supply in opening, grading, and repairing streets, and to deny them that privilege would in many instances occasion intolerable inconvenience and expense.

But I think the action is maintainable on another ground. The conceded duty which rests upon all municipalities to keep their streets in reasonably safe condition would be but half discharged were they permitted to suffer dangerous operations to be so negligently conducted in the immediate vicinity of such streets as to jeopardize the safety of the traveling public along the same. Such works as imperil human life and safety are classified as public nuisances. And in *City of Richmond v. Smith*, 101 Va. 161, 13 Am. Neg. Rep. 465, 43 S. E. 345, it was held: "If a city, without legislative authority, authorizes the erection of a nuisance in one of its streets, it is liable in damages for the injuries resulting therefrom. The city cannot escape liability merely because it exceeded its powers in authorizing the nuisance."

Blasting, it is true, is not *per se* a nuisance; but blasting near a highway or street becomes a nuisance when it is conducted in such a manner as to endanger the safety of travelers along such highway or street. *City of Paris v. Comm. (Ky.)*, 93 S. W. 907.

In 28 Cyc. 1292, note 38, the reason for the rule is stated thus: "Nuisances in or near public street.—In general—The doctrine of the liability of a municipality for failure to abate a nuisance in or near a public street arises out of the rule enforced in those jurisdictions that a municipal corporation is bound to keep its streets and sidewalks in a reasonably safe condition, and that failure to perform this duty constitutes a breach of ministerial duty, and the liability does not rest upon a failure to perform a judicial duty of abating a nuisance. *Dalton v. Wilson*, 118 Ga. 100 [44 S. E. 830, 98 Am. St. Rep. 101]. And upon this principle it is held that, if the nuisance is in or near a public street so as to endanger the safety of travelers

thereon, a municipality will be liable for any special damage suffered by reason of the existence of the nuisance and the failure to abate the same. *Dalton v. Wilson*, *supra*; *Parker v. Macon*, 39 Ga. 725 [99 Am. Dec. 486]; *Moore v. Townsend*, 76 Minn. 64, [6 Am. Neg. Rep. 95, 78 N. W. 880]."

As the owner of property a municipality is amenable for its proper use. "The corporation of the city of New York has no more right to erect and maintain a nuisance on its lands than a private person possesses." *Brower v. New York*, 3 Barb. (N. Y.) 254, 258.

In this aspect of the case sustaining the demurrer involves the incongruity that, if a city suffers a third party to operate a rock quarry in a negligent manner so near to one of its streets as to inflict injury upon a traveler thereon, it is liable in damages; yet, if it does the same act by its own servants, it is not liable. A course of reasoning which leads to such result can hardly be sound.

If the act were *ultra vires*, the underlying principle upon which the city would be liable is that, being charged with the duty to keep its streets in reasonably safe condition, it is estopped to set up the defense that the street was rendered unsafe by a nuisance of its own creation which it had no authority to maintain.

I am of opinion that the judgment ought to be affirmed.

FRANK v. VILLAGE OF WARSAW.

[COURT OF APPEALS OF NEW YORK, MAY 17, 1910.]

198 N. Y. 463.

1. Municipal Corporations—Streets—Obstruction—Removal.

It is the duty of municipal authorities to remove an obstruction from a street when it possesses the character of permanency, and in case of their failure to do so the municipality may be charged with negligence in case of injury arising therefrom, and the fact that such obstruction rests upon wheels and may readily be moved from place to place does not in any true sense make it a highway vehicle.

2. Municipal Corporations—Liability—Streets—Explosion.

A village is liable for personal injuries to one caused by the explosion of a peanut roaster which, to the personal knowledge of the trustees, had obstructed the highway for many weeks before the accident.

Appeal by defendant from a judgment of the Appellate Division of the Supreme Court in the Fourth Department (129 App. Div. 936, 115 N. Y. Supp. 1121), affirming a judgment in favor of plaintiff, John Frank, entered upon a verdict in an action brought to recover damages for personal injuries caused by the explosion of a peanut roaster upon a public street. Affirmed.

For appellant—Elmer E. Charles.

For respondent—Eugene M. Bartlett.

COMPLAINT.

The plaintiff complaining of the defendant in the above entitled action, alleges:

First: That the defendant is, and at the time hereinafter mentioned, was a municipal corporation, organized and existing under the laws of the State of New York.

Second: That on the 16th day of August, 1904, while the plaintiff was lawfully walking along and upon the sidewalk and street in the Village of Warsaw, known as Main Street, which said sidewalk and street is and was at that time a public street and highway and a much

NOTE.

On the subject of Liability of Municipal Corporations for Obstructions on Highway, see notes in 6 Am. Neg. Rep. 84; 7 Am. Neg. Rep. 356.

And on the subject of Liability of Municipal Corporations for Personal Injuries, see notes in 12 Am. Neg. Rep. 79, 84, 104, 178, 203.

traveled thoroughfare in the center of the Village of Warsaw, and which said sidewalk and street were in constant use by citizens of the said defendant and others, and had been used as a public street for upwards of twenty years by said village and public, and while being upon said street and sidewalk, in front of certain premises then owned by one Philip Coloross, on the east side of said Main Street in the said village, a steam boiler, which was attached to and a part of a wagon steam peanut and popcorn machine, and which said wagon and steam peanut and popcorn machine and steam boiler, as plaintiff is informed and believes, were placed near the outer side of said sidewalk in said public street by the said Philip Coloross, his agents and employees, with the knowledge and consent of the said defendant and its officers, exploded and caused fragments of glass, iron and other substances to be thrown upon and against this plaintiff and into his eyes, whereby he was greatly, grievously, painfully and sorely wounded, about his body, eyes and head, and his eyes were permanently blinded.

Third: That the said plaintiff was so violently, permanently, and painfully injured by reason of the careless, unlawful and negligent acts and omissions of duty of the defendant and its officers, that the said defendant and its officers unlawfully, carelessly and negligently failed and neglected to keep said street and sidewalk in front of the said premises occupied and owned by the said Philip Coloross afore-said free and clear from any obstacles, obstructions and machines dangerous to persons lawfully traveling upon said sidewalk and had unlawfully, negligently and carelessly permitted the said steam boiler, wagon steam peanut and popcorn machine operated and worked by steam, to be operated and managed upon said sidewalk and public street in the Village of Warsaw, by persons unskilled and inefficient in the operation of said steam boiler, wagon steam peanut and popcorn machine and had unlawfully, carelessly and negligently permitted and allowed said machine, wagon steam peanut and popcorn machine so operated by steam by said unskilled and inefficient operatives to be located, managed and used in and on said sidewalk and public street.

Fourth: That the said steam boiler, wagon steam peanut and popcorn machine was an illegal obstruction, a public nuisance on said sidewalk and in said street and was dangerous and a menace to persons passing upon said sidewalk and street; that, as plaintiff is informed and believes, said defendant and its officers well knew at the time and before said 16th day of August, 1904, that the said steam boiler wagon, steam peanut and popcorn machine was on said side-

walk and in said street and was an illegal and dangerous obstruction thereto, and a public nuisance on said sidewalk, and was a menace to persons passing upon and along said sidewalk and street.

Fifth: That by reason of the aforesaid negligent, careless and unlawful acts of the said defendant and its officers, and by reason of the said negligence, careless and unlawful omission of the said defendant and its officers, the said plaintiff received the violent, permanent and painful injuries aforesaid and the same were so received without any fault, negligence or omission on the part of the said plaintiff.

Sixth: That the said plaintiff, on account of the said injuries so received by him, has been obliged to and has expended and paid out and will be obliged to pay out and expend large sums of money, for his cure, nursing, treatment and medical attention, and said plaintiff became sick, sore and blind and so remains and has been and will during the continuance of his life be prevented from attending to his business and unable to labor, by reason of all of which facts said plaintiff has been damaged in the sum of twenty-five thousand dollars.

Seventh: That a written verified statement of the nature of the plaintiff's claim and of the time and place at which said injuries of the plaintiff were received was filed with the village clerk of the said Village of Warsaw, within six months after the cause of action herein accrued, and that this action was commenced more than thirty days after said claim was so filed and presented.

Wherefore, the plaintiff demands judgment against the said defendant for the sum of twenty-five thousand dollars, besides the costs of this action.

ANSWER.

The defendant in the above entitled action, answering the complaint of the plaintiff therein, alleges:

First. It admits the allegations contained in paragraphs or subdivisions of said complaint marked or numbered "First" and "Seventh."

Second. It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs or subdivisions of said complaint, marked or numbered "Second" and "Sixth."

Third. The defendant denies the allegations contained in the paragraphs or subdivisions of said complaint marked or numbered, "Third," "Fourth" and "Fifth."

Wherefore, the defendant demands judgment that the complaint be dismissed with costs.

WILLARD BARTLETT, J. The plaintiff has lost both of his eyes by reason of the explosion of the boiler of a patent steam peanut roaster and popcorn heater on a public street in the village of Warsaw. This machine was supported by wheels, and the owner was permitted by the trustees of the village to maintain it stationed in the street in front of a shop where he vended fruit and candy. It had obstructed the highway at this place for many weeks before the accident, to the personal knowledge of all the village trustees, a majority of whom admitted upon the witness stand that they were aware that such a machine was likely to explode unless properly constructed and carefully operated. For their negligence in sanctioning its maintenance there under these circumstances, the village municipality has been held liable in the present action to the extent of \$10,000 damages awarded by the jury to the plaintiff.

We think that this judgment must be sustained upon the authority of *Cohen v. Mayor, etc.*, of New York (113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506), and the two cases of *Jane and Samuel Wells v. City of Brooklyn* (9 App. Div. 61, 41 N. Y. Supp. 143; appeal dismissed, 158 N. Y. 699, 53 N. E. 1113; 45 App. Div. 623, 60 N. Y. Supp. 802; 21 App. Div. 626, 47 N. Y. Supp. 1151; *affd.*, 162 N. Y. 657, 57 N. E. 1128). The presence of the peanut roaster in the public street, stationed there as it was from early morning until late at night, undoubtedly constituted an unlawful obstruction, just as the grocery wagon did in the *Cohen* case and the showcase in the *Wells* suits. It is argued that its obstructive character was not the cause of the injury to the plaintiff, which was attributable rather to its explosive character. In *Cohen v. Mayor, etc.*, of N. Y. (*supra*), the injury was due to the fall of the thills of a grocery wagon stored in the street, and it was urged that if the thills had not been negligently tied up they would not have fallen and killed the plaintiff's intestate. To this Judge Peckham answered that that was simply the way in which the accident occurred, by reason of the presence of the obstruction. "There is always reasonable ground for apprehending accidents from obstructions in a public highway, and any person who wrongfully places them there or aids in so doing, must be held responsible for such accidents as occur by reason of their presence. The obstruction in such case must be regarded, within the meaning of the law on the subject, as the proximate cause of the damage." (p. 538)

The trial judge accordingly charged the jury that the presence of the peanut roaster in the village street was the proximate cause of the injury to the plaintiff, and that the peanut roaster was wrongfully in the highway; but he also distinctly instructed them that these facts did not suffice to render the defendant liable. They were told that the question for them to determine was whether the village officials, charged with the duty of keeping the streets clear from dangerous obstructions, knew or ought to have known, under all the circumstances, that there was danger of an explosion and consequent danger to travelers and passers along the street. If such was the case the village was liable for the consequences of the explosion; but, if it was "a matter that could not reasonably be anticipated by prudent men" then the plaintiff's case failed.

The vital issue was thus correctly submitted to the jury. The learned judge adhered substantially to this view of the law in dealing with the defendant's numerous requests to charge and we find no error either in passing upon these requests or in the principal instructions given which would justify a reversal. The judgment must, therefore, be affirmed.

It should be distinctly understood that the principle underlying the affirmance of the judgment in this case has no application to vehicles in their ordinary and reasonable use as such. The roadway of every public street is designed to be used by vehicles in passing and repassing from place to place, and vehicles may be halted either for the convenience or pleasure of their owners or occupants as they are customarily employed in the community. Familiar instances are the waiting of a doctor's carriage during his attendance upon a patient or the halting of an automobile before a residence or place of business. No one would think of treating even a prolonged occupancy of the street under such circumstances as an unlawful obstruction so far as to charge the municipality with liability for not causing its removal. It is only when the occupation is so protracted as to possess an element of permanency that its obstructive character makes it the duty of the municipal authorities to remove it. This steam peanut roaster was not in any true sense a highway vehicle merely because it rested upon wheels and could thus be readily moved from place to place. It was utilized as a permanent stand at which peanuts could be roasted and vended in a public street.

CULLEN, Ch. J., HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur; WERNER, J., dissents.

Judgment affirmed, with costs.

CROGHAN v. SCHWARZENBACH.

[SUPREME COURT OF NEW JERSEY, JUNE 15, 1911.]

— N. J. —, 79 Atl. 1027.

Master and Servant—Injury to Servant—Medical Attention by Superintendent—Authority.

Where defendant's agent told an employee of the defendant to wash the bleeding finger of another employee, and also told him to look for bandages in a medicine chest containing medicines for first aid for persons injured in the factory and the employee so directed negligently used the contents of a bottle of carbolic acid in dressing the wound, by reason of which the finger was gangrened and had to be amputated, *held*, that a jury could infer that the use of a medicine found within the medicine chest was within the authority given by the defendant's agent to the employee to dress the wounded finger.

[Headnote by the Court.]

Error to the Circuit Court of Hudson County, to review a judgment rendered in favor of plaintiff in an action brought to recover damages for injuries sustained by a servant due to the alleged negligence of another servant in treating an injury sustained by the former. *Affirmed*.

For plaintiff in error—Collins & Corbin.

For defendant in error—Queen & Stout.

DECLARATION.

Robert J. F. Schwarzenbach, formerly doing business as Schwarzenbach, Huber & Company, the defendant in this suit, was summoned to answer unto Patrick H. Croghan, the plaintiff therein, in an action of tort, and the said plaintiff being an infant under the age of 21 years, his father, Patrick Croghan, has been admitted to prosecute this action in his behalf as his next friend, and thereby the said Patrick H. Croghan by Patrick Croghan, his next friend, complains:

NOTE.

A search has disclosed no case, other than CROGHAN v. SCHWARZENBACH (the case at bar), on the subject of the Liability of a Master for the Negligence of an Employee, Other than a Physician, in Dressing the Injury of Another Employee.

On the subject of the Implied Author-

ity of an Agent or Employee to Bind his Employer for Medical Services Rendered an Injured Person, see exhaustive note in this volume of Negligence and Compensation Cases Annotated (1 N. C. C. A.) p. 1-29, *ante*.

And see, also, on the same subject, note in 15 Am. Neg. Cas. 733-745.

For that whereas, the said defendant, to wit, on the sixth day of July, A. D., one thousand nine hundred and nine, at Bayonne, in the county aforesaid, the time of the committing of the grievances and injuries hereinafter mentioned, was the proprietor and operator of a certain building, mill or factory situate in Bayonne aforesaid, used and operated in the manufacture of silks and other fabrics, and being such proprietor and operator of the said building, mill or factory in the city and county aforesaid, did hire and employ the said plaintiff as an employee and servant to do and perform certain work in said building, mill or factory, for hire, wages and reward, paid by the said defendant to the said plaintiff in his behalf and for the purposes aforesaid, and in the course of the said defendant's lawful and proper business in said building, mill or factory aforesaid.

And the plaintiff avers that on the day and year last aforesaid, the said plaintiff while in the employ of the said defendant as aforesaid, pricked or scratched the little finger of his right hand with a pair of scissors, which the said plaintiff was then and there using in and about his employment aforesaid.

And the plaintiff avers that the said defendant had theretofore established, and then and there maintained at the said building, mill or factory under his charge, control and custody, a medicine chest containing acids, salves, bandages and medicines which the said defendant used for the curing and treatment of his employees who were, or might be, injured while in and about his business aforesaid.

And the plaintiff avers that the said acids, salves, bandages and medicines were exceedingly dangerous when carelessly, negligently, incompetently or unskillfully used, managed and applied, and that it then and there became the duty of the said defendant to use reasonable care in the management, use and application of the said acids, salves, bandages and medicines when using the same in the treatment of his employees as aforesaid, and to use reasonable care in selecting and providing a person of ordinary competency and skill in the use and application of the acids, salves, bandages and medicines aforesaid when using and applying the same in the treatment of his employees for the purposes aforesaid.

And the plaintiff avers that the said defendant, neglecting his duty in this behalf, did not use reasonable care in the management, use and application of the acids, salves, bandages and medicines aforesaid, and did not use reasonable care in selecting and providing a person of ordinary competence and skill in the use and application of the same, but on the contrary caused the said plaintiff's said finger, which had been scratched or pricked as aforesaid, to be carelessly,

negligently and unskillfully treated with the acids, salves, bandages and medicines aforesaid by a person who was not of ordinary competence or skill in the use and application of the acids, salves, bandages and medicine aforesaid, so that the plaintiff's said finger became sore and festered and had to be and was amputated by reason of the negligence, carelessness, unskillfulness and incompetency aforesaid, and by reason of the negligence, carelessness, unskillfulness and incompetency aforesaid, the plaintiff lost the little finger of his right hand, and became and was permanently hurt, maimed, bruised and injured, to wit, on the day and year first aforesaid, at Bayonne, in the county aforesaid; by reason whereof he was prevented from pursuing his necessary affairs and business for a long space of time, to wit, thence hitherto, and was otherwise greatly damaged and will be permanently injured, to wit, on the day and year first aforesaid, at Bayonne, in the county aforesaid; by reason of the premises he has sustained great loss and injury, to wit, the sum of five thousand dollars, and therefore he brings his suit, etc.

PLEA.

And the said defendant, Robert J. F. Schwarzenbach, formerly doing business as Schwarzenbach, Huber and Company, by Collins & Corbin, his attorneys, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him. And of this the said defendant puts himself upon the country, &c.

REED, J. The plaintiff, while employed by the defendant, had a finger injured by a pair of scissors which he used in his work. The scissors punctured his finger so that it bled. He sought a Mr. Albach, who was the superintendent of the defendant's works, and showed him his finger. Mr. Albach said to the plaintiff: "Wait, I will have it dressed for you." There was kept in the factory a medicine chest in which was kept bandages and some remedies, among which was a bottle of carbolic acid. These remedies were kept for use as first aid for persons injured in the works of the factory. This chest was in the charge of an employee named Murphy. Murphy, who had the key of the chest, was not in the factory at the time of the accident. Mr. Albach spoke to another employee named Streuter, asking him to open the medicine chest, and Streuter did so by taking out three screws. Mr. Albach also spoke to another employee named Kreutzer,

a German, who proceeded to wash and bandage the finger of the plaintiff. In doing this Kreutzer applied some of the contents of the bottle of carbolic acid to the injured finger. It appears that carbolic acid in an extremely diluted shape is a usual application for wounds of this character. The testimony is, however, that Kreutzer seems to have used the contents of the bottle in the medicine chest, which was 90 per cent. pure carbolic acid without any, or insufficient, dilution. The effect of this application seems to have caused a gangrenous condition of the finger, which resulted in the necessity for its amputation. The purpose of this action is to hold the defendant liable for the result of this act of Mr. Kreutzer.

The exceptions sealed upon the trial were to the refusal of the trial court to direct a verdict for the defendant, and exceptions to certain portions of the charge. The point insisted upon in all these exceptions is that Kreutzer was not acting within the scope of any authority conferred upon him by the defendant, or its agent, when he applied the carbolic acid. The only authority of Kreutzer's, if it existed, was contained in the directions given him by Mr. Albach. There is no insistence by the defendant that Albach was not a representative of the defendant in his direction to Kreutzer to care for the injured finger. The insistence of the defendant is that the extent of Albach's direction to Kreutzer was that he should wash the finger of the plaintiff and apply a bandage.

It is contended that the trial court erred in refusing to direct a verdict for the defendant, and erred in leaving to the jury the determination of what was said by Albach to Kreutzer, and the inference to be drawn therefrom, and leaving to the jury the question whether the words "treat the finger" or the words "dress the finger," if used, might be understood by a reasonable man to mean that he should treat the wounded finger in the ordinary way, if there be an ordinary way, by the use of medicines as well as bandages. So the question involved is limited to the point whether there was that in the testimony which would support a theory that Kreutzer, from what Albach said to him, could have reasonably inferred that he was directed to use in his discretion any medicine found in the medicine chest. In respect to what was said by Albach to Kreutzer, it appears that he spoke to him in German, and the plaintiff, who heard the conversation, being ignorant of that language, has no knowledge of its import, except from his inference from what Kreutzer did. Mr. Albach says he told Kreutzer to wash off the finger; and Mr. Kreutzer says that Albach said to him that there was a little boy standing outside on the floor, and for him to go out to the sink and wash his finger.

The trial court charged that, if that was the extent of the language used, there could be no recovery against the defendant; but, if the direction was to bandage, dress, or treat the wound, it was a question for the jury to say whether the inference would arise that Kreutzer could use a medicine in his treatment. It appears, however, that both Albach and Kreutzer had in mind that something more than a mere washing of the finger was to be done, for both testified that Kreutzer asked for bandages, and Albach told him that all the stuff was in the medicine chest, from which chest Kreutzer got the material for bandaging the wound. So there was an implied direction or permission to Kreutzer not only to wash the finger, but to bandage it. This constituted undoubtedly a dressing. In the chest from which the wadding was obtained were the medicines used in dressing wounds, and known to be used—just as the bandages were—for that purpose. Mr. Albach knew that these medicines, including salves and carbolic acid, were among the remedies. It would seem that Kreutzer could draw the inference that such curative agents were there for the purpose of use in the dressing of wounds, and that Mr. Albach should have known that Kreutzer could draw such an inference.

In the absence of any warning to Kreutzer against the employment of anything but water in dressing the wound, I think the jury had a right to draw an inference that Kreutzer from what Albach said to him in the circumstances could conclude that he was to use in dressing the wound any article found in the medicine chest; and that his ignorant use of the carbolic acid was imputable to the defendant whose agent selected and clothed Kreutzer with the duty of treating the wound.

The judgment should be affirmed.

CAREY v. CHICAGO, ROCK ISLAND & PACIFIC RY. CO.

[SUPREME COURT OF KANSAS, MARCH 11, 1911.]

84 Kan. 274, 114 Pac. 197.

Master and Servant—Injuries—Negligence of Master—Contributory Negligence.

A number of workmen were employed in uncovering rock in a quarry operated by a railroad company, their duties not involving loading or handling the cars. Several loaded cars awaiting removal were standing upon a spur track, near where they were at work. On account of a rain all but one of them entered the cars; he took shelter beneath a car, and was run over and killed when a freight train backed into the cars in the process of picking them up. His widow recovered a judgment; the jury finding that the railroad company was negligent in failing to give proper warning of the approach of the train. *Held*, that the defendant owed no duty to the deceased to give such warning, and that his own conduct constituted negligence as a matter of law.

[Headnote by the Court.]

Appeal by defendant from a judgment of the District Court of Morris County, rendered in favor of plaintiff in an action brought to recover for the alleged negligent death of her husband who was killed by being run over by a train of cars. Reversed.

For appellant—M. A. Low, Paul E. Walker, and Nicholson & Pirtle.

For appellee—Hamer & Harris, and C. A. Crowley.

MASON, J. G. W. Carey was run over by a car of the Chicago, Rock Island & Pacific Railway Company, receiving fatal injuries. His wife recovered a judgment against the company, and it appeals.

Carey was employed by the defendant as a workman in a stone quarry two miles west of Dwight. A spur track 20 rods long ran from the main line in a southwesterly direction to the quarry, curving around an embankment which cut off a view of the main track east of the switch. The spur track was used exclusively for setting in empty

NOTE.

On the subject of the Duty of a Master to Warn or Instruct his Servant, see note in 16 Am. Neg. Rep. 137.

And on the subject generally, see the "Master and Servant Cases" in vols. 13-16 Am. Neg. Cas., where the cases, from the earliest period to 1896,

decided in the several States and Territories, are reported and classified and arranged in alphabetical order of States. Subsequent decisions to date are reported in vols. 1-21 Am. Neg. Rep., Current Series, and in this volume (1. N. C. C. A.) and succeeding volumes of Negligence and Compensation Cases Annotated.

cars to be loaded, and shifting loaded cars to the main line. The cars upon it were handled only in one train, an east-bound daily freight, due about 11 o'clock in the morning. Usually the train would stop west of the spur, uncoupling the engine to do the necessary switching. Infrequently it would pass without stopping, in which case it would stop on its east-bound trip on the following morning and do the work. Very infrequently it would go through to Dwight, and after an interval back up from there and take out the loaded cars and set in empty ones. On the day of the accident two crews of workmen were engaged in the quarry. That to which the deceased belonged were stripping or uncovering rock near the switch. Their duties did not require them to be upon the track; they had nothing to do with loading or handling the cars. The other crew were quarrying and loading near the west end of the spur. The freight train referred to was about two hours late. It ran past the switch to Dwight, and later backed up to pick up some cars. Shortly before this a hard rain had set in. Four loaded cars were standing on the spur near the switch, close to, but not touching, each other. All of the crew to which the deceased belonged, except himself, took refuge in the third car from the switch. He, as found by the jury, took shelter under the fourth. The workman of the other crew retired to a box car provided by the company, used as a toolhouse and office, situated near the end of the spur, but off the track. The train backed into the nearest of the cars with such force as to push them together and move the furthest one about a car's length. Carey was thereby run over and fatally injured. A special finding stated that the negligence of the defendant consisted in not giving a proper warning signal. We conclude that the plaintiff cannot recover, because the evidence and findings do not disclose any actionable negligence of the defendant, but, on the other hand, do establish that the accident resulted from the want of ordinary care on the part of deceased. In the absence of a statute a railway company is not required to give warning of the approach of a train, except where it has reason to anticipate that persons will be upon the track. 33 Cyc. 782. Here the trainmen owed no such duty to Carey, inasmuch as they did not know of his presence and had no reason to suppose that any person would be under the cars. Liability for negligence can result only from the violation of a duty owed to the person injured. See *Express Co. v. Everest*, 72 Kan. 517, 522, 83 Pac. 817, and cases there cited. Shortly after the impact, a brakeman saw one of the workmen inside a car and heard the voices of others. The conductor also saw some men in the car about the same time. But if there was then time to give warning to these men,

and the company was guilty of negligence towards them, its neglect in this regard did not extend to the decedent. In answer to the question whether any of the train crew knew that Carey was under the car, the jury answered that the trainmen did not know Carey. The reasonable interpretation of the answer, in view of the question, is that it was intended to mean that the trainmen did not know that Carey was under the car. But in any event, the effect must be the same, for there was no evidence that he was seen by any of the train crew.

Assuming, however, that the company may have been negligent, we think the conduct of the deceased was such as to prevent a recovery. The rule is generally, if not universally, accepted that for one unnecessarily to remain upon a railroad track is negligence as a matter of law; none the less so because customary warnings of the approach of a train may have been omitted. In getting under a car which had been loaded and only awaited the convenience of the company to be hauled away, the deceased was clearly within this rule. The fact that in this instance the train that did the switching first ran on to Dwight and then backed up, instead of doing the work as usual, upon reaching the spur track from the west, does not affect the matter. At the most such a departure from custom could have no greater effect than an omission to perform some positive duty, and would not render the defense of contributory negligence unavailable. *Dyerson v. Railroad Co.*, 74 Kan. 528, 533, 534, 87 Pac. 680.

The contention is made that the evidence was sufficient to justify a finding that the company's employees were guilty of misconduct amounting to wantonness in failing to give a warning of the approach of the train, since two of them knew that men were in or about the cars to be picked up. We do not think that the fact that the trainmen saw a workman in one of the cars, and heard the voices of others, was sufficient to suggest to them the probability of any one being under the cars or in a similar position.

The judgment is reversed, and the cause remanded, with directions to render judgment for the defendant. All the Justices concurring.

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The third part is devoted to a study of the
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applications of the theory to the theory of
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study of the applications of the theory to the
theory of science.

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INDEX TO CASES.

[A Table of Cases Classified According to the Facts, an Index to Pleadings and an Index to Notes precede this general Index.]

ACTIONS.

See Master and Servant, 45 et seq.

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AGRICULTURAL ASSOCIATIONS.

1. Injury to Patron; Balloon Ascension; Act of Independent Contractor.

The fact that an agricultural association employed an independent contractor to give an aeronautic exhibition at its fair, does not relieve it from liability to one injured by the descent of the balloon which the operator had left in midair by the aid of a parachute. *Cannoy v. Rochester Agricultural & Mechanical Ass'n*, — N. H. —. 1:456.

AMUSEMENTS.

Liability of master for injury by sportive act of servant, see Master and Servant, 27.

Proof of prior accidents by fall of balloon, see Evidence, 3.

If accommodations afforded to the public for hire are not reasonably suitable and safe for the purpose for which they may ordinarily and apparently be used in a customary way, the public should be excluded from their use, or appropriate notice of their unsuitable

or unsafe condition should be so given as to warn persons of dangers in using them. *Turlington v. Tampa Electric Co.*, — Fla. —.....1:490

1. Duty of Proprietor as to Care.

Where one undertakes to render a service by furnishing accommodations of a public nature, the law imposes a duty to use proper care, precaution, and diligence in providing and maintaining the accommodations in a reasonably safe condition for the purposes to which they are adapted and are apparently designed to be used. *Turlington v. Tampa Electric Co.*, — Fla. —.....1:490

The proprietor of an amusement park, to which the public is invited, must exercise reasonable care to keep the premises reasonably safe for visitors, whether admission is charged to the grounds or not. *Turgeon v. Connecticut Co.*, 84 Conn. 538.....1:609

2. — Compensatory Damages.

A failure to perform a duty due to the public in furnishing public accommodations may be negligence that, if it proximately results in injury to another without his fault, will constitute a cause of action for compensatory damages. *Turlington v. Tampa Electric Co.*, — Fla. —.....1:490

Where, by virtue of the relation towards each other existing between parties, the law implies a duty from one to the other, a breach of that duty by one that proximately causes or contributes to causing a substantial injury

to the other may constitute a cause of action for compensatory damages, if the plaintiff is free from fault. *Turlington v. Tampa Electric Co.*, — Fla. —1:490

3. — Lease to Independent Contractor.

The owner of an amusement park is not relieved from the duty of exercising reasonable care in the construction, maintenance and operation of a miniature railway, by leasing it to an independent contractor, especially when a general supervision of the property is retained. *Turgeon v. Connecticut Co.*, 84 Conn. 538.....1:609

4. Miniature Railway; Derailment of Engine; Injury to Patron.

A nonsuit should not be granted in an action to recover damages for personal injuries sustained when an engine operated on a miniature railroad jumped the track, where the evidence discloses that the roadbed was in bad condition and that, although the engine had frequently left the track at the curve where the accident occurred and where people were likely to be assembled, no guard rail had been erected or warning given. *Turgeon v. Connecticut Co.*, 84 Conn. 538.....1:609

5. — Contributory Negligence of Patron.

One who, while listening to a band in an amusement park, stands with his back towards the track of a miniature railway some four or five feet away, is not, as matter of law, chargeable with negligence contributing to his injury sustained when the engine jumped the track. *Turgeon v. Connecticut Co.*, 84 Conn. 538.....1:609

6. Bathing Resort; Injury to Patron; Springboard; Unsafe Diving Place.

Where the relation of a keeper of a body of water and a springboard over it for the use of the public as a diving and swimming place and of a patron

for hire of such place exists between two parties, it is the duty of such keeper to exercise proper care, precaution, and diligence to provide and maintain a reasonably suitable and safe springboard, and water of reasonably suitable and safe depth under and about the springboard, free from obstructions or other dangers to comfort and safety in the ordinary and customary use of such diving and swimming place, and, if the place is not reasonably safe, the public should be excluded from its use or appropriately warned of its dangers, otherwise the keeper may be negligent for which an action lies by one proximately injured by the negligence. *Turlington v. Tampa Electric Co.*, — Fla. — 1:491

Allegations that, owing to the fact that the water under a springboard kept and used for hire as a public diving place was about 2½ feet to 3½ feet deep, it in fact constituted a dangerous place to those resorting there for bathing and diving, that the defendant negligently suffered the same to be and remain in the dangerous condition, and that by means whereof the plaintiff's decedent without his fault was injured, state a cause of action. *Turlington v. Tampa Electric Co.*, — Fla. —1:491

7. — Insufficiency of Proof of Negligence, Contributory Negligence.

Where the negligence of the keeper for hire of a public diving and bathing place that proximately caused injury to another as alleged is not proven by the plaintiff, or if it appears that the injured person was guilty of contributory negligence, damages cannot be recovered for the injury. *Turlington v. Tampa Electric Co.*, — Fla., —... 1:491

ANIMALS.

Carriage of, see Carriers, 17, 18.

Fright of horse caused by the opera-

tion of automobile, see Automobiles, 4.

Fright of horse at shavings and dust thrown toward horse through blow-pipe, see Highways, 9.

1. Savage Horse in Field Crossed by Public.

One who, without giving any warning whatever, places a savage horse with dangerous propensities in a field which he has permitted the public habitually to cross, is liable to a person injured by the animal. *Lowery v. Walker*, L. R. App. Cas. 10 (1911). 1:215

APPEAL.

Raising on appeal objection as to variance between pleading and proof, see Trial, 7.

1. Question Raised on Appeal; Error.

Appellant cannot properly claim that a question submitted to the jury should have been disposed of as matter of law, when to do so would have required that an error be made in his favor. *Blanchard v. Vermont Shade Roller Co.*, 84 Vt. 442.....1:152

2. Review; Conclusiveness of Findings or Verdict.

A verdict rendered in a negligence action supported by sufficient evidence is conclusive on appeal. *Herlitzke v. LaCrosse Interurban Telephone Co.*, 145 Wis. 185.....1:422

The weight of evidence introduced in an action against a terminal carrier to recover damages for injury to a piano, to overcome a presumption that the piano was damaged after it was received from a connecting carrier, is for the jury, and their verdict will not be disturbed on appeal. *Parnell v. Atlantic Coast Line K. Co.*, — S. C. —.....1:318

A finding on an issue of fact, based on conflicting evidence, will not be disturbed on appeal. *Smith v. General Motor Cab Co.*, App. Cas. 188 (1911). 1:576

3. Exceptions.—Necessity.

An instruction in an action to recover for personal injuries allowing the one injured to recover sums expended and to be expended by him is not erroneous, although there is no evidence of what had been expended, where no exception was taken as to past expenditures and nothing is claimed as to future expenses. *Blanchard v. Vermont Shade Roller Co.*, 84 Vt. 4421:152

A motion to strike a plea relates only to matter in the record proper, and no exception to the ruling thereon is necessary. *Southern Turpentine Co. v. Douglass*, 61 Fla. 424.....1:788

4. — Waiver.

Exceptions not argued in exceptant's brief are deemed waived. *Hill v. Day et al.*, — Me. —.....1:313

5. Bill of Exceptions; Contents.

A bill of exceptions sufficiently shows that it contains all of the evidence in the case and that it was certified and allowed by the judge, where the bill was O. K'd. by counsel for respondent and the trial judge certified that it was tendered to him with the request that it be signed and sealed and made a part of the record, "all of which is accordingly done," thereby adopting as correct the certificate of the stenographer that the bill of exceptions contained all the evidence. *Gregoric v. Percy-Lasalle Mining & Power Co.*, — Colo. —; 122 Pac. 785.....1:715

6. Entry of Judgment

The Supreme Court of Appeals, on reversing the judgment of the Circuit Court and sustaining a demurrer to the declaration, will enter a final judgment where, on the presumption that the plaintiff made the strongest presentation of her case which the facts permit, it could not be bettered if leave were given to amend. *City of Radford v. Clark*, — Va. —.....1:909

7. Instructions.—Failure to Give.

Failure clearly to charge that the person inflicting the injury complained of was a fellow servant, is not prejudicial, where, even if he were, the master would still be liable. *Blanchard v. Vermont Shade Roller Co.*, 84 Vt. 442.....1:152

8. — Duty of Party to Request or Call Attention to Error.

A party will not be heard to complain on appeal of the failure of the trial court to give an instruction to the jury regarding the effect of the introduction of the Carlisle Mortality Tables in evidence in an action to recover damages for personal injuries, where he failed to request the court to give such instruction or to call the attention of the court to the omission. *Newingham v. J. C. Blair Co.*, 232 Pa. 5111:163

A party will not be heard to complain on appeal of the error of the trial judge in misquoting the testimony in his charge to the jury, when he failed to call the court's attention to the error before the jury retired. *Newingham v. J. C. Blair Co.*, 232 Pa. 511.....1:163

9. — Presumption as to Error.

Erroneous instructions will be deemed to have been prejudicial where the jury reached a final agreement only after twenty-four hours delay, and when an additional instruction as to the desirability of their reaching a decision, if practicable, had been given to them. *Wilke v. Illinois Central R. Co.*, — Iowa, —.....1:581

10. — Curing Error.

The failure of an instruction for the plaintiff in an action for malpractice, to specify the conduct to be observed in order to fill the requirements of ordinary care, is not cured by an instruction for the defendant limited to and based upon a particular and con-

tested averment in the latter's case. *Atkinson v. American School of Osteopathy*, — Mo. —.....1:275

The direction of a judgment for the defendant *non obstante veredicto* cures the erroneous submission to the jury of a question raised by a defense which is sustained by undisputed evidence, whereby the jury are afforded an opportunity to return a verdict against the defendant. *Walters v. American Bridge Co.*, — Pa. —.....1:374

11. — Erroneous Instruction Not Prejudicial.

The giving of an instruction which is subject to criticism, but which occasion no prejudice is not cause for reversal. *Atkinson v. American School of Osteopathy*, — Mo. —.....1:275

ASSUMPTION OF RISK.

See Master and Servant, 32 et seq.

AUTOMOBILES.

Care required of one operating "sight seeing" automobile, see Carriers, §.

1. Duty of Pedestrian; Reciprocal Duties.

A pedestrian is not required to "look and listen" for rapidly moving automobiles before crossing a street; but both driver and pedestrian, each recognizing the rights of the other, are required to exercise reasonable care. *Shebor v. Barbour*, — Ala. —....1:120

2. License; Connection Between Absence and Injury.

In absence of actual connection between the failure of the driver of an automobile to procure a license as required by statute, and an injury caused by the machine, the driver cannot be held liable in damages to a child who was injured by being struck by the automobile, although the operation of an automobile on the streets of a city by a person without a license from the

secretary of state, is negligence *per se*.
Lindsay et al. v. Cecchi, — Del. —
..... 1:88

3. Liability of Owner for Negligence of Borrower.

The owner of an automobile which is being operated by a borrower, though the former is in the car at the time, is not liable, in absence of statute, for personal injuries to a conductor who was standing on the board of a street car, caused by the negligent operation of the machine by the borrower, on the theory that an automobile, being a dangerous machine, the owner must be responsible for the manner in which it is used. Hartley v. Miller, 165 Mich. 116. 1:126

4. Fright of Horse; Duty of Driver of Car.

The owner of an automobile is required to take notice that such machines are liable to scare horses along the highway and to keep a proper lookout not to cause injury to others avoidable by proper care in the use of his machine. Gaskins v. Hancock, 156 N. C. 56. 1:101

The operator of an automobile must, under Rem. & Bal. Code, section 5570, stop the forward motion of the car to avoid frightening horses, if requested by the driver by signal or otherwise, and must not go on unless the horses are under control, or it is necessary to avoid accident or injury to himself. Brown et al. v. Thorne, 61 Wash. 18, 111 Pac. 1047. 1:107

5. — General Verdict as Consistent With Special Verdict.

In an action to recover damages for personal injuries sustained by a woman whose horse was frightened by the alleged excessive speed and loud noise of an automobile, and the failure of the operator of the car to stop his machine on signal, a general verdict found in favor of the plaintiff is

not inconsistent with a special verdict of "noise, appearance, and excessive speed of an automobile," found in answer to the question as to what caused the fright of the horse, and a special verdict of "Yes. Sudden appearance as it came into sight at high speed," found in answer to the question whether it was the appearance or the noise of the automobile which caused the fright. Brown et al. v. Thorne, 61 Wash. 18, 111 Pac. 1047. 1:107

6. Contributory Negligence.

Contributory negligence is not a defense where the injuries complained of were inflicted by the running of an automobile. Shebor v. Barbour, — Ala. —. 1:120

7. Speed as Question for Jury.

The question whether the speed of an automobile was, under the evidence, wanton, is one for the jury. Shebor v. Barbour, — Ala. —. 1:120

8. Pleading; Sufficiency.

A plea that defendant stepped "immediately in front" of the automobile by which he was injured, is a good answer to a count charging simple negligence. Shebor v. Barbour, — Ala. —. 1:120

A count in a complaint in an action for wanton injuries alleged to have been received from a collision between plaintiff and defendant's automobile, as the proximate consequence of "the wanton act of defendant's agent or servant while acting within the line and scope of his authority" is sufficient, although it does not set out the facts constituting wanton conduct. Shebor v. Barbour, — Ala. —. 1:120

9. Trial.—Misleading Instruction Requested.

A requested charge in an action for injuries sustained by one who was run over by an automobile, is properly refused as misleading, where it singles out the evidence pertaining to the

speed of the car and requires a charge on that fact alone, without regard to whether it caused the injury. *Shebor v. Barbour*, — Ala. —.....1:120

10. — Evidence as Insurance.

In an action brought to recover damages for personal injuries sustained by a child in consequence of the careless operation of an automobile, it is reversible error to permit the plaintiff to adduce evidence before the jury to show that the defendant was insured against accidents. *Akin v. Lee*, 206 N. Y. 20.....1:694

11. Damages; Compensatory and Punitive.

Punitive damages may be awarded for personal injuries wantonly inflicted by the running of an automobile. *Shebor v. Barbour*, — Ala. —...1:120

Compensatory, and not punitive, damages should be awarded to one who is injured when his team took fright at an approaching automobile which the operator failed or was unable to stop promptly on signal. *Gaskins v. Hancock*, 156 N. C. 56.....1:101

BAGGAGE.

See Carriers, 10-15.

BALLOON.

Liability of agricultural association for injury to one struck by falling balloon, see Agricultural Associations, 1.

Proof of prior accidents by fall of balloon, see Evidence, 3.

BATHING.

Injury to patron at bathing resort, see Amusements, 6.

BLASTING.

See Highways, 6; Municipal Corporations, 7-9.

BRIDGES.

Collision between bridge and boat, see Collisions, 1.

Who may take advantage of contract to repair bridge, see Contracts, 1.

1. Negligence of Independent Contractor.

A company subletting a contract with a county, for the repair of a bridge, to an independent contractor, who has entire charge of the work, is not liable for injuries from the latter's negligence, sustained by one while crossing the bridge. *Walters v. American Bridge Co.*, — Pa. —.....1:374

In an action for personal injuries sustained by one while crossing a bridge undergoing repair, a defense that the work was being done by an independent contractor raises no question for the jury, where the evidence sustaining it is not improbable nor at variance with any proof or admitted facts or with ordinary experience. *Walters v. American Bridge Co.*, — Pa. —.1:374

CARRIERS.

See Employer's Liability Acts.

Care in transportation of gas, see Gas.

Conclusiveness of finding of jury as to when piano damaged, see Appeal, 2.

1. Passengers.—Care Required of Carrier.

One engaged in the business of carrying passengers for hire over a regular route in a "sight seeing" automobile, is bound to exercise the highest degree of care consistent with the proper transaction of the business. *Hinds v. Steere*, 209 Mass. 442.....1:134

It is not the duty of a street car conductor to warn a passenger, who erroneously believed that the car had come to a stop, not to leave it while in motion, where there is nothing in the passenger's appearance to denote helplessness or of his apparent intention to leave the car. *Hutchinson v. Capital Traction Co.*, 36 App. D. C. 251.1:627

2. — Whom Carrier May Refuse to Accept.

A carrier may properly refuse to

carry passengers whose conduct or condition from intoxication, contagious disease, or other things, is such as to make their presence on board the train dangerous to the lives and health of other passengers. *Bogard's Adm'r v. Illinois Central R. Co.*, 144 Ky. 649. 1:651

3. — Injuries to Passenger.—Door Shutting on Hand.

Negligence on the part of a railroad company cannot be inferred from the mere slamming of the door of a passenger car, thereby crushing the hand of a woman passenger who had rested her hand upon the door jamb while in the act of leaving the car to alight at her station. *Christensen v. Oregon Short Line R. Co.*, 35 Utah, 137, 99 Pac. 676. 1:232

It is not negligence *per se* for a woman passenger to place her hand upon the jamb of the door of a railroad passenger car when in the act of alighting at her station, so as to bar a recovery by her for an injury to her hand caused by the slamming of the car door. *Christensen v. Oregon Short Line R. Co.*, 35 Utah, 137, 99 Pac. 676. 1:232

4. — — Insufficient Heating of Car.

A carrier is not liable to a passenger who sustains injury to his health on account of the insufficient heating of the coach in which he was riding, in absence of proof that the carrier had reason to foresee that a dangerous condition would exist in the coach and to anticipate injury to any healthy person by reason of the atmospheric conditions therein. *Marcott v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 147 Wis. 216. 1:383

In an action brought against a carrier to recover damages for personal injuries sustained by a passenger on account of the insufficient heating of a sleeping car, evidence held to be insufficient to show that the passenger

contracted pneumonia on account of insufficient heat as alleged. *Marcott v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 147 Wis. 216. 1:383

5. — — Sustained When Alighting; Recoil of Train.

A passenger preparing to disembark from a train, which was almost in the act of stopping, is not entitled to recover for injuries sustained by being thrown against a seat by the recoil of the train, resulting from the application of the emergency brakes, in conformity with statutory requirements, to prevent striking and probably killing a boy who suddenly appeared on the track. *Southern Ry. Co. v. Brooks*, — Tenn. —. 1:252

6. — — Contagious Disease.

A railroad company is not liable for the death of a passenger who died from measles communicated to him from a fellow passenger on one of its trains, in absence of proof showing that the officers or servants in charge of the train had some knowledge or notice that a passenger thereon was afflicted with such contagious disease, and thereafter failed to exercise ordinary care to prevent contagion to other passengers on the train. *Bogard's Adm'r v. Illinois Central R. Co.*, 144 Ky. 649. 1:651

7. — — Injury After Alighting From Street Car; Car on Other Track.

A person who alighted from one street car and after passing around the rear of such car was killed by another car going in the opposite direction from the one from which he had alighted, is only bound to exercise reasonable care under all of the circumstances to avoid injury by the approaching car. *Stack v. East St. Louis & Suburban Ry. Co.*, 245 Ill. 308. 1:687

A person cannot be chargeable with contributory negligence, if, upon pass-

ing around the rear of a street car from which he had just alighted he is confronted by imminent danger from another car going in the opposite direction, and in confusion does nothing or takes a step or two in the wrong direction and as a result is struck by the car. *Stack v. East St. Louis Suburban Ry. Co.*, 245 Ill. 308.....1:687

Negligence in running a street car at an excessive rate of speed without sounding a gong, past another car which had stopped at a crossing to permit passengers to alight, will not relieve one who was passing around the rear of the car from which he had just alighted, from the necessity of exercising care for his own safety, but such negligence may be considered in determining whether his conduct was such as an ordinarily prudent man might have adopted under similar circumstances. *Stack v. East St. Louis & Suburban Ry. Co.*, 245 Ill. 308. 1:687

In an action for damages for the death of one who had stepped from one street car and was killed by another car going in the opposite direction, the burden of proof is upon the plaintiff to show that the deceased was exercising ordinary care at the time of the accident, to be determined as a fact from the circumstances surrounding the event. *Stack v. East St. Louis & Suburban Ry. Co.*, 245 Ill. 308. 1:687

8. — — Boarding Street Car; Inside Platform.

In an action to recover damages for injuries sustained by a passenger who, while attempting to board a car by means of the platform on the side of the parallel tracks, was struck by a car on such tracks, in which the evidence was conflicting on the question whether the car which the passenger was attempting to board stopped at the time and point where passengers were in the habit of boarding cars, evidence of a custom on the part of

the street car company to stop its cars at such point to permit passengers to alight from or to board its cars, was relevant to uphold plaintiff's contention, although standing alone it was insufficient proof that the car stopped at that point at the time of the injury. *Norfolk & Atlantic Terminal Co. v. Rotolo*, 195 Fed. 231.....1:72

Although a passenger was guilty of negligence in attempting to board a moving street car by going upon the steps on the side of the car toward the parallel tracks of the company when the gate of the car was closed, yet if the company could, by the exercise of reasonable care, have discovered the dangerous position of the plaintiff, the obligation devolved upon the company, under the doctrine of last clear chance, to avoid causing him injury by contact with another car. *Norfolk & Atlantic Terminal Co. v. Rotolo*, 195 Fed. 231.1:72

A street car company is liable for injuries sustained by a passenger who boarded a car at the place where cars were accustomed to stop to take on and discharge passengers at both sides, in consequence of the negligence of the company in running a car on a parallel track against him while he was on the lower step. *Norfolk & Atlantic Terminal Co. v. Rotolo*, 195 Fed. 231..1:72

9. — — Damages; Injuries to Nervous System.

A passenger upon a street car who was injured by being violently thrown forward on the back of the seat in front of him when the car in which he was riding collided with a train, but who was able to leave the car and walk a short distance to his place of business where he collapsed, is entitled to recover damages for injuries to his nervous system, since such injuries were as much the direct result of the negligence of the street car company as those to his physical system, and in

any case, it is impossible for a jury to sever the damages. *The Toronto Ry. Co. v. Toms*, 44 Can. Sup. Ct. Rep. 268.1:338

10. Baggage.—Manuscript As.

The manuscript of a manual on Greek grammar, which one who had been a passenger on board a steamship had prepared and of which he had no copy, and which he used in his work as a teacher, contained in a trunk with other property, may be considered as one of the tools of his trade and, as such, a part of his baggage, for which the steamship company is liable if negligently lost. *Wood v. Cunard Steamship Co. Ltd.*, 192 Fed. 293.1:65

11. — Limitation of Liability.

On a libel by one who had been a passenger on board a steamship for the loss of a trunk, evidence held to be insufficient to establish an agreement limiting the liability of the carrier to £5 (five pounds sterling.) *Wood v. Cunard Steamship Co. Ltd.*, 192 Fed. 293.1:65

A finding as to a special contract limiting the carrier's liability for loss of baggage, is unnecessary in an action to recover damages therefor, where it is found that the carrier was negligent. *Wells v. Great Northern Ry. Co.*, 59 Ore. 165.....1:659

A clause printed on a ticket issued at a reduced rate, which limits the carrier's liability for baggage, although assented to by the passenger, will not exonerate the carrier from accountability for loss due to the negligence of its agents. *Wells v. Great Northern Ry. Co.*, 59 Ore. 165.....1:659

12. — — Waiver.

Issuance by a railroad company of a check for a trunk which it is notified contains watchmaker's and jeweler's tools, besides clothing, amounts to a waiver of a contract stipulation limit-

ing its baggage liability to wearing apparel only. *Wells v. Great Northern Ry. Co.*, 59 Ore. 165.....1:659

13. — Value; Sufficiency of Evidence.

On libel against a steamship company for the negligent loss of a passenger's trunk containing a manuscript of a manual on Greek grammar, evidence held to show that the manuscript was not worth more than \$500. *Wood v. Cunard Steamship Co. Ltd.*, 192 Fed. 293.....1:65

14. — Burden of Proof.

It is incumbent upon a carrier, which has undertaken to transport the baggage of a passenger, pursuant to an express contract limiting its liability, to show that the loss of the baggage, due to the derailment and burning of the car containing it, did not result from its negligence. *Wells v. Great Northern Ry. Co.*, 59 Ore. 165...1:659

15. — Pleading; Sufficiency.

In an action brought to recover damages for the loss of baggage destroyed by the derailment and burning of a baggage car, the complaint, if it contains a suggestion of negligence, is sufficient, although it fails to set forth the facts constituting the negligent act or omission, or to aver the facts composing the secondary agency or force, or to detail the resultant injury and the damages, where the burden of disproving negligence rests on the carrier. *Wells v. Great Northern Ry. Co.*, 59 Ore. 165.....1:659

16. Goods.—Delivery to Carrier; Presumption as to Condition.

A terminal carrier who delivers to a consignee in a damaged condition, a piano which it received from a connecting carrier, is presumed to have received the same in good condition, and, therefore, has the burden of showing that it was damaged when received

by it. *Parnell v. Atlantic Coast Line R. Co.*, — S. C. —.....1:318

In an action against a terminal carrier to recover damages for injuries to a piano, received in the course of shipment, the court should order a nonsuit, where the defendant produces clear and conclusive evidence to rebut the presumption that the injuries occurred after it had received the same from a connecting carrier. *Parnell v. Atlantic Coast Line R. Co.*, — S. C. —.....1:318

17. Live Stock—Care Required.

The measure of care required of a carrier to avoid injury to stock in transit, from changes in temperature, is reasonable care and not the highest possible degree of care. *Wilke v. Illinois Central R. Co.*, — Iowa, —. 1:581

18. — Exposure to Heat; Burden of Proof.

The burden of proving that the undue exposure of car loads of stock to heat, resulted from or was contributed to by the carrier's negligence, rests upon the shipper, if he accompanies the shipment in person or by agent. *Wilke v. Illinois Central R. Co.*, — Iowa, —.....1:581

CHARITABLE INSTITUTIONS.

See Hospitals.

COAL HOLE.

See Municipal Corporations, 3.

COLLISIONS.

1. Between Bridge and Boat.

A steamer which has signaled for a bascule bridge over the Chicago River to open, is not at fault for proceeding at slow speed, upon the assumption that the bridge will open, nor in continuing to approach until but 200 or 300 feet away, in the absence of any warning that the bridge could not or would not be opened, where the master of the steamer could hear others

calling upon the bridge tender to open the bridge, so as to bar a recovery for damages sustained by the boat when it came into contact with the bridge by being carried along by her own momentum and the current of the river. *Munroe et al. v. City of Chicago*, 194 Fed. 936.1:398

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CONSTITUTIONAL LAW.

See Employer's Liability Acts; Statutes; Workmen's Compensation.

Validity of statute abrogating fellow-servant rule, see Master and Servant, 31.

Validity of statute making railroad companies engaged in mining liable for personal injuries to employee due to negligence of fellow servant, see Master and Servant, 28.

1. Validity of Statute; Acceptance of Benefits by Servant as Bar to Recovery of Damages.

Congress has power to provide that the acceptance by an injured employee of benefits from a "Relief Fund" shall not operate as a bar to the recovery of damages and to declare that any agreement to that effect shall be void. *Philadelphia, Baltimore & Washington R. Co. v. Schubert*, 224 U. S. 603. 1:892

The Act of March 7th, 1905, known as 24 Stat. at Large, p. 962, which provides that the acceptance of benefits by the servant of an employer maintaining a relief department for employees, shall not bar a recovery by such servant for injuries sustained in the course of his employment, is not an unreasonable exercise of the police power of the State. *Miller v. Atlantic Coast Line R. Co. et al.* — S. C. —.....1:447

It is within the power of Congress, in establishing rules of liability of interstate carriers for injuries sustained by employees in the course of their

service, to invalidate existing contracts between carriers and their employees stipulating for an exemption of liability in consideration of acceptance of benefits from a "Relief Fund." Philadelphia, Baltimore & Washington R. Co. v. Schubert, 224 U. S. 603. 1:892

The Act of March 7th, 1905, known as 24 Stat. at Large, p. 962, which provides that the acceptance of benefits by a servant of an employer maintaining a relief department for his employees, shall not operate as a bar to a recovery by such employee for injuries sustained in the course of his employment, is applicable to a contract existing between the employer and such servant entered into before the passage of the Act, and which contract provides "that the acceptance by the plaintiff (servant) of the benefits under the relief department contract operates as a bar, and a complete defense to the action, the acceptance of such benefits having operated as a full release, satisfaction, and accord of any right of action that the plaintiff might otherwise have," and therefore an employee who sustained an injury after the passage of such Act is entitled to take advantage of its provisions. *Miller v. Atlantic Coast Line R. Co. et al.*, — S. C. —....1:447

CONTRACTS.

See Employer's Liability Acts.

Contract limiting liability of carrier, see Carriers, 11, 12.

1. Contract to Repair Not to be Sublet; Who May Claim Advantage.

A stipulation in an agreement between a county and a bridge company, for the repair of a bridge, that the contract shall not be sublet, cannot be taken advantage of in a suit against the company, by one injured while crossing the bridge by the negligence of an independent contractor performing the work. *Walters v. American Bridge Co.*, — Pa. —.....1:374

COUNTERCLAIM.

Damages sustained by employer by acts of minor servant as counterclaim to action for services, see Parent and Child, 3.

COURT.

See Justice of the Peace; Workmen's Compensation, 2, 4.

Explanation of term used in judgment, see Judgment, 2.

1. Decisions of Federal Courts as Binding on State Courts.

The decisions of the Federal Supreme Court on Federal questions are conclusive on the State courts. *Miller v. Atlantic Coast Line R. Co. et al.*, — S. C. —.....1:447

2. Actions Under Federal Employer's Liability Act in State Courts.

Rights arising under the Employer's Liability Act of April 22, 1908, c. 149 (35 Stat. 65), may be enforced in the courts of the States when their jurisdiction as fixed by local laws, is adequate to the occasion. *Second Employers' Liability Cases*, 223 U. S. 1.1:875

A state court is not at liberty to decline cognizance of actions to enforce rights arising under the Employer's Liability Act of April 22, 1908, c. 149 (35 Stat. 65), either on the ground that the policy manifested by the Act is not in harmony with the policy of the State or because the exercise of jurisdiction would be attended with inconvenience and confusion. *Second Employers' Liability Cases*, 223 U. S. 1.1:875

CRIMES.

Violation of statute as affecting servant's right to recover for injury, see Master and Servant, 43.

DAMAGES.

See Automobiles, 11; Carriers, 9.

Compensatory damages for negli-

gence of one furnishing public accommodation, see Amusements, 2.

Burden of proof as on plaintiff, see Evidence, 1.

Remission of damages as condition to new trial, see Trial, 6.

1. Pleading; *Ad damnum* Clause.

A declaration in an action, even though sounding in damages, is not demurrable because it does not state the amount of damages claimed in the form of an averment. It is sufficient if it appear in any part of the declaration. The *ad damnum* clause, while consistent with good form in pleading, is not indispensable. *Jenkins v. Montgomery*, 69 W. Va. 795.....1:58

DEMURRER.

See Pleading, 2.

DISEASE.

Right of carrier to refuse to accept passenger afflicted with contagious disease, see Carriers, 2.

Liability of carrier for spread of contagious disease, see Carriers, 6.

ELECTRICITY.

Electric shock while using telephone, see Telegraphs and Telephones, 1.

1. Duty to Turn Off at Time of Fire; Negligence.

It is not the duty of an electric light and power company to turn off the electricity from a district from which a fire alarm has been sent in; but it is enough if it is ready to cut off the current when necessity arises and on notice from the proper authorities. *Pennebaker et al. v. San Joaquin Light & Power Co.*, 158 Cal. 579 112 Pac. 459.....1:349

An electric light and power company, which fails to send an employee to the scene of a fire to disconnect wires, or signal for the disconnection of the district, is not chargeable with negligence, in the absence of an ordinance imposing such duty upon it.

Pennebaker et al. v. San Joaquin Light & Power Co., 158 Cal. 579, 112 Pac. 459.1:349

Negligence is not imputable to an electric light and power company because its employees who were spectators at a fire, failed to disconnect fallen wires. *Pennebaker et al. v. San Joaquin Light & Power Co.*, 158 Cal. 579, 112 Pac. 459.....1:349

2.—Injury to Fireman.

The failure of an electric light company to disconnect wires, carrying but 260 volts, which were cast to the ground on private property by the burning of a building, of which it had no notice, does not render it liable for the death of a fireman who stepped upon the wires. *Pennebaker et al. v. San Joaquin Light & Power Co.*, 158 Cal. 579, 112 Pac. 459.....1:349

3. — Evidence; Report as to Cutting Off Current.

A report made by the city electrician to the board of trustees, concerning an arrangement with an electric light and power company, that the latter would cut off the current on request of the proper authorities, in case of fire, is admissible on the question of negligence in an action brought against the company to recover damages for the death of a fireman who stepped upon a deadly wire. *Pennebaker et al. v. San Joaquin Light & Power Co.*, 158 Cal. 579, 112 Pac. 459.....1:349

4. — Negligence of Firemen.

A fireman who goes among electric light wires which have fallen from a burning building, knowing that they are charged with a deadly current, is guilty of negligence which will bar a recovery by him from the electric light company owning and maintaining the wires. *Pennebaker et al. v. San Joaquin Light & Power Co.*, 158 Cal. 579, 112 Pac. 459.....1:349

EMPLOYER'S LIABILITY ACTS.See **COURTS.****1. Validity.**

The provision of the Employer's Liability Act of April 22, 1908, c. 149, § 5 (35 Stat. 65), declaring void any contract, rule, regulation or device, the purpose or intent of which is to enable a carrier to exempt itself from the liability which the Act creates, is not repugnant to the Fifth Amendment to the Constitution of the United States as an unwarranted interference with the liberty of contract. *Second Employer's Liability Cases*, 223 U. S. 1.1:875

That the liability created by the Employer's Liability Act of April 22, 1908, c. 149 (35 Stat. 65), is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit of all employees of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains or to hazards that differ from those to which other employees in such commerce, not within the Act, are exposed, does not render the classification repugnant to the "due process of law" clause of the Fifth Amendment. *Second Employer's Liability Cases*, 223 U. S. 1.1:875

The power of Congress to regulate the liability of a carrier engaged in interstate commerce, for injuries sustained by an employee while engaged in such commerce, embraces instances where the causal negligence is that of another employee engaged in interstate commerce. *Second Employer's Liability Cases*, 223 U. S. 1.1:875

Congress, in the exercise of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employees, to the extent of abrogating the fellow-servant rule, restricting the defenses of con-

tributory negligence and assumption of risk and extending the carrier's liability to cases of death. *Second Employer's Liability Cases*, 223 U. S. 1.1:875

2. Construction and Operation.

The provision of the Employer's Liability Act of April 22, 1908, c. 149 (35 Stat. 65) § 5, "that any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability" created by the Act, shall to that extent be void, includes within its condemnation a contract of membership in a relief department stipulating that the acceptance of benefits under the contract shall be equivalent to a release from liability; especially in view of the proviso in § 5 permitting a set-off, in an action brought against a common carrier by an injured employee, of any sum the company has contributed toward any benefit paid to the employee. *Philadelphia, Baltimore & Washington R. Co. v. Schubert*, 224 U. S. 603. 1:892

The regulation of the relations of common carriers by railroad and their employees, while both are engaged in interstate commerce, prescribed by the Employer's Liability Act of April 22, 1908, c. 149 (35 Stat. 65), supersedes the laws of the States in so far as the latter cover the same field. *Second Employers' Liability Cases*, 223 U. S. 1.1:875

The provision of the Employer's Liability Act of April 22, 1908, c. 149 (35 Stat. 65) § 5, declaring void any contract or regulation, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the Act, applies as well to existing, as to future contracts and regulations of the described character. *Philadelphia, Baltimore & Washington R. Co. v. Schubert*, 224 U. S. 603.1:892

EVIDENCE.

See Witnesses.

Evidence as to insurance in action to recover for injuries by automobile, see Automobiles, 10.

Report by city electrician to board of trustees of arrangement with electric light company relating to cutting off current at time of fire, as admissible on question of negligence in action brought for death of fireman, see Electricity, 3.

Expression of opinion as to condition of leased premises, see Landlord and Tenant, 5.

Declarations of agent, see Principal and Agent, 2.

1. Burden of Proof.

The burden of proof is on the plaintiff in an ordinary suit for damages. *Wichers v. New Orleans Acid & Fertilizer Co.*, 128 La. 1011.....1:697

2. Res ipsa loquitur.

The maxim *res ipsa loquitur* is merely a rule of evidence applicable in negligence actions. *Christensen v. Oregon Short Line R. Co.*, 35 Utah, 137, 99 Pac. 676.....1:232

3. Proof as to Prior Accident.

Evidence that no accident had resulted from the descent of a balloon in previous years when ascensions were made at an agricultural fair, has no tendency to show that an accident was not likely to happen. *Canney v. Rochester Agricultural & Mechanical Ass'n*, — N. H. —.....1:456

4. Proof of Mental or Physical Condition.

Conduct and expressions of the plaintiff in an action brought to recover for personal injuries, occurring some months after the accident, and indicative of her mental or bodily health at the time, are competent evidence on that subject. *Canney v. Rochester*

Agricultural & Mechanical Ass'n, — N. H. —.....1:456

Statements by an employee injured in the course of his employment made to a physician who treated him, concerning his condition, symptoms, sensations and feelings, both past and present, are admissible where the physician testifies as an expert, for the purpose of affording the jury means of determining the weight to be given to the opinion of such physician, but are inadmissible to show the actual condition of such employee at the time of which he spoke. *Acme Cement Plaster Co. v. Westman*, — Wyo. —. 122 Pac. 89.....1:408

5. Declaration as Binding Another; Condition of Machine.

A remark by a person as to the condition of a defective wheel on a track velocipede, is inadmissible to charge with knowledge of the defect, one who rode on the velocipede which was operated by another, where the remark is not shown to have been made in his hearing. *Gila Valley Globe & Northern Ry. Co. v. Hall*, 13 Ariz. 270, 112 Pac. 845.....1:367

EXCEPTIONS.

See Appeal, 3-5.

EXPLOSIONS.

Explosion of gas, see Gas, 3.

Explosion of gun used by servant to protect sheep, see Master and Servant, 17.

Explosion of peanut roaster on street, see Municipal Corporations, 6.

1. Explosion of Oil; Violation of Statute; Contributory Negligence.

In an action based on the statutory liability of defendant under § 2223, Rev. Codes, 1905, by a person who has sustained injuries as the result of an explosion of oil sold in violation of law: *Held*, construing said statute, that the Legislature did not intend to abro-

gate the defense of the contributory negligence of the person injured, where such contributory negligence was the proximate and efficient cause of such explosion. *Morrison v. Lee*, — N. D. —.1:258

FIRES ESCAPES.

1. As Place to Work.

A tinner and roofer in the employ of a contractor making certain repairs on the roof of defendant's building, who was directed and required by the defendant to use the fire escape in the course of his work, had a right to rely on the presumption that the defendant had performed its duty in providing a reasonably safe means of access to the roof, as an outside stairway. *Newingham v. J. C. Blair Co.*, 232 Pa. 511. 1:163

The fact that the servant of a contractor who had been employed to make certain repairs to the roof of defendant's building, used an elevator or stairway in the building in the course of his work in disregard of the orders of defendant, did not affect his right to rely on the safety of the fire escape which he was directed to use. *Newingham v. J. C. Blair Co.*, 232 Pa. 511.1:163

In an action by a tinner and roofer to recover damages for personal injuries sustained by the fall of a defective fire escape used by him while in the employ of a contractor on defendant's building, it will not be presumed that defendant complied with the law relating to fire escapes, where there is no evidence of an inspection as required by Act of May 2, 1905, section 22, and there is proof that the accident would not have occurred if a proper inspection had been made. *Newingham v. J. C. Blair Co.*, 232 Pa. 511.1:163

2. — Action for Injuries.—Undue Strain.

In an action by a tinner and roofer

to recover damages for personal injuries sustained by the fall of a defective fire escape while in the employ of a contractor on defendant's building, the refusal of the trial judge to charge that if the plaintiff jumped three and a half feet from the top of the fire wall to the floor of the fire escape, and so subjected it to an undue strain, he could not recover, did not constitute reversible error, where the court instructed the jury that it was for them to determine whether the plaintiff acted in the way an ordinarily prudent person would under the circumstances, and that if the negligence of the plaintiff contributed in any way to his injury, he could not recover. *Newingham v. J. C. Blair Co.*, 232 Pa. 511.1:163

3. — — Notice of Condition; Warning.

In an action by a tinner and roofer to recover damages for personal injuries sustained by the falling of a defective fire escape used by him while in the employ of a contractor upon defendant's building, evidence that the defendant had notice of the defective condition of the fire escape and intended to give warning of its dangerous character, was properly excluded as irrelevant and immaterial. *Newingham v. J. C. Blair Co.*, 232 Pa. 511. 1:163

4. — — Evidence.

In an action by a tinner and roofer to recover damages for personal injuries sustained by the fall of a defective fire escape used by him while in the employ of a contractor on defendant's building, evidence that plaintiff was inside of the building after defendant directed the workmen to reach the roof by way of the fire escape, and not by the elevator or stairway, was properly excluded as irrelevant. *Newingham v. J. C. Blair Co.*, 232 Pa. 511.....1:163

FIREMAN.

Injury to fireman by electric wires, see Electricity.

FIRES.

Duty to turn off electricity at time of fire, see Electricity, 1.

Mislocation of fire plug, see Municipal Corporations, 14.

Caused by shutting off water supply from gas heater, see Waters, 2.

FRAUD.

Misrepresentation as to age of servant as affecting relation of master and servant, see Master and Servant, 1.

GAS.

Plant emitting fumes and gases as nuisance, see Nuisance, 1.

Fire caused by shutting off water supply from gas heater, see Waters, 2.
1. Care in Transportation; Inspection.

Natural gas is inflammable and explosive in a high degree and a very dangerous agency and those who transport it are bound to exercise great care, to maintain safe pipes, and to inspect them carefully to detect any leaks or defects. *Hashman v. Wyandotte Gas Co.*, 82 Kan. 328, 111 Pac. 468..... 1:816

2. — Presumption as to Want of Care.

The burning of escaping gas on the streets in which the pipes were laid and in a densely populated section of the city justified the inference that the appellant knew, or should have known, of the defective condition of defendant's gas pipes. *Hashman v. Wyandotte Gas Co.*, 83 Kan. 328, 111 Pac. 468..... 1:816

3. Explosion; Evidence; Presumption.

Although there was no direct evidence that the natural gas which exploded and injured appellee came from the gas pipes of appellant, the fact that on two different occasions just before the explosion gas came up through the ground, caught fire, and

burned above appellant's gas pipes close to the place of the explosion, together with the fact that the pipes had been in the ground a considerable time, and had rusted and scaled to quite an extent, justified the inference drawn by the jury that the gas which exploded and caused the injury came from the pipes of the appellant. *Hashman v. Wyandotte Gas Co.*, 83 Kan. 328, 111 Pac. 468.....1:816

GRATING.

Inspection of, see Highways, 10, 11.

HIGHWAYS.

See Automobiles; Bridges; Municipal Corporations.

Escape of gas, see Gas, 2.

Injury to one falling into ditch dug in highway for purpose of laying water pipe to dwelling, see Independent Contractor, 1.

Liability of landlord to pedestrian injured by defect in walk, see Landlord and Tenant, 8.

Injuries or death at railroad crossings, see Railroads, 1.

Injury sustained by sagging wires, see Telegraphs and Telephones, 2, 3.

1. Obstructions.—Liability; Duty of Another to Remove.

A person who places an obstruction in a public highway cannot relieve himself from responsibilities for injuries resulting therefrom to a traveler upon the highway by showing that some other person is under a legal liability to remove it. *Brady v. Public Service Ry. Co.*, 80 N. J. L. 471. 1:755

2. — Nuisance; Liability.

A person who obstructs a public highway, or renders its ordinary use dangerous, creates a public nuisance, and for injuries resulting directly therefrom to travelers upon the highway he is legally answerable. *Brady v. Public Service Ry. Co.*, 80 N. J. L. 4711:755

3. — Corner Stone; Injury to Driver; Proximate Cause.

The act of a landowner in placing a large stone at a turn of a road to protect the corner post was not the proximate cause of injuries sustained by the driver of a spirited team of colts who was thrown from his wagon when a wheel struck the stone on a dark night while he was searching in the wagon box for his mittens, without keeping the lines in his hands. *Hendrickson v. Swenson*, — S. D. — 1:590

4. — Negligence of Driver.

One who, while driving a spirited team of colts down a hill on a dark night, lays down the lines to search in the wagon box for his mittens, and is thrown out when the wheel strikes a large stone set at a turn of the road to protect the corner post, is guilty of such negligence as will preclude recovery of damages from the person who placed the stone in the road. *Hendrickson v. Swenson*, — S. D. —1:590

5. Injury to Child; Presumption as to Negligence of Driver.

The fact that the driver of a wagon driven along the street at a moderate pace, jumped off and picked up a child lying in the street, alleged to have been run over by him, and after placing it in its mother's arms, drove rapidly away, is not an admission of negligence on his part or sufficient to afford a presumption of negligence. *Schier et al. v. Wehner*, 116 Md. 553. 1:301

Proof that a child started to cross a street in front of a team approaching at a moderate pace, and was injured, does not authorize an inference of negligence in the absence of evidence as to how the accident occurred. *Schier et al. v. Wehner*, 116 Md. 553. 1:301

6. Defects; Blasting as.

Blasting conducted by municipal employees in a rock quarry located 65 feet from a street, is not a defect in the highway. *City of Radford v. Clark*, — Va. —.....1:909

7. Care Required of Travelers; Assumption that Road Safe.

While persons traveling on a public highway in the night time are required to exercise such ordinary care and caution as a reasonably prudent man would exercise under the circumstances, and in view of the darkness, they have the right, in the absence of knowledge to the contrary, to act on the assumption that such highway is in a reasonably safe condition for travel by night as well as by day, and are not bound to anticipate dangerous defects therein without some notice or other precaution taken for their protection. *Daniels et al. v. Randolph County Court*, — W. Va. —.....1:820

8. Abandoned Road; Duty to Erect Barriers; Notice.

Where an old road or way becomes dangerous to travel and is abandoned for a new location which is established, public authorities in charge of the work must put up barriers or warnings to protect persons traveling thereon, acting upon the belief, justified by appearances, that the old way is still open, and it is negligence not to do so. *Daniels et al. v. Randolph County Court*, — W. Va. —.....1:820

Where a highway containing a plain well-beaten track is discontinued, it is the duty of the public authority responsible therefor, to give such notice or warning, or erect such barriers as will prevent its use by travelers by night as well as by day, and in the absence of such notice travelers have the right to presume that such highway has not been discontinued or obstructed. *Daniels et al. v. Randolph County Court*, — W. Va. —.....1:820

A case in which the evidence of prior knowledge of the discontinuance of or defects in an old road, held not sufficient to show, as matter of law, contributory negligence of plaintiffs who were injured while traveling thereon in the night time. *Daniels et al. v. Randolph County Court*, — W. Va. —1:820

9. Fright of Horse; Dust and Shavings.

The owner of a saw and planing mill from which shavings and dust are thrown through a blowpipe toward the highway, is not liable for personal injuries sustained by a traveler whose horse took fright when passing the mill, unless the objects discharged are such as to frighten a horse of ordinary gentleness. *Rodgers v. Harper & Moore*, 170 Ala. 647.....1:78

10. Inspection of Grating.

The fact that an iron grating, resting on a wooden frame and forming a part of the sidewalk, had been in position for over 20 years, imposes on the abutting property owner, as a prudent man, the duty of inspection. *McLaughlin v. Kelly, Jr.*, 230 Pa. 251. 1:81

11. Duty as to Safety of Grating.

A property owner is not relieved from the duty of keeping an iron grating, forming a part of the sidewalk in front of his premises, and the wooden frame on which it rests, in a safe condition, by the fact that the grating is close to the building. *McLaughlin v. Kelly, Jr.*, 230 Pa. 251.....1:81

HORSES.

See Animals; Live Stock.

HOSPITALS.

1. Liability of Charitable Institution.

The fact that a public charitable hospital receives pay from a patient for lodging and care does not affect its character as a "charitable institution," nor its rights or liabilities as

such in relation to such a patient. *Taylor, Adm'r v. Protestant Hospital Ass'n*, 85 Ohio St. 90.....1:438

A public charitable hospital, organized as such and open to all persons, although conducted under private management, is not liable for injuries to a patient of the hospital, resulting from the negligence of a nurse employed by it. *Taylor, Adm'r v. Protestant Hospital Ass'n*, 85 Ohio St. 90.....1:438

ICE AND SNOW.

See Municipal Corporations, 4.

INDEPENDENT CONTRACTOR.

Employment of independent contractor to give exhibition as relieving agricultural association from liability for injury by balloon, see Agricultural Associations, 1.

Lease of amusement park to independent contractor as relieving owner of liability for injury caused by operation of miniature railway, see Amusements, 3.

Negligence of independent contractor in repair of bridge, see Bridges, 1.

1. Injury to One Falling Into Ditch.

If the owner of a house let the work of opening the ditch and laying the pipe to an independent contractor, and such contractor causes the ditch to be dug, and to be left open and unguarded, and a traveler upon the street falls into it in the nighttime and is injured, without fault on his part, such independent contractor is liable. *Jenkins v. Montgomery*, 69 W. Va. 795. 1:58

INFANTS.

See Parent and Child.

Injury to child as creating presumption as to driver's negligence, see Highways, 5.

Misrepresentation as to age of servant as affecting relation of master and servant, see Master and Servant, 1.

Duty toward infant trespassing upon wagon, see Trespass, 2.

1. Injury to.—As Licensee in Mill.

A child carried into a cotton seed oil mill by her mother without invitation, express or implied, and wholly as a matter of convenience, when she went to the mill to carry dinner to her husband who worked therein, cannot be said to have been attracted there because it appealed to her childish curiosity and interest. *Blossom Oil & Cotton Co. v. Poteet*, — Tex. —.1:306

A company operating a cotton seed oil mill is not liable for injuries to a child, about 4½ years old, caused by stepping into an uncovered seed conveyor when she followed her father as he hurried to the aid of his wife, about whom a large quantity of seed had slid, while she was engaged in doing her husband's work while he was eating the dinner which she and the child had brought to him. *Blossom Oil & Cotton Co. v. Poteet*, — Tex. —.1:306

A mother who, over the protest of the owner of a cotton seed oil mill, brings her child into the mill where the father is employed as day laborer, and who also has been told not to allow the child to enter, cannot thereby impose the duty on the mill owner to watch over and care for the infant to see that she does not voluntarily injure herself. *Blossom Oil & Cotton Co. v. Poteet*, — Tex. —.1:306

2. — By Contact With Power Fan.

Evidence that a boy thirteen years of age was fatally injured by putting his hand in contact with a power fan, maintained in an unguarded condition, in connection with a factory, at a place accessible from the outside, where children were permitted to play justifies a finding of actionable negligence on the part of the owner. *Smith v. Marion Fruit Jar & Bottle Co.*, 84 Kan. 551, 114 Pac. 845.....1:620

3. Degree of Care to be Used in Play.

A child in playing with other chil-

dren is only required to exercise that degree of care which the great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child. *Briese v. Maechtle*, 146 Wis. 891:769

4. Liability for Tort.

A minor is responsible for compensatory damages resulting from torts in the same manner as an adult. *Briese v. Maechtle*, 146 Wis. 89..1:769

No actionable negligence on the part of defendant is shown by proof that plaintiff and defendant were boys about 10 years of age, attended the same school, were friends, and while playing in the school yard at recess the defendant accidentally ran into the plaintiff as he was kneeling to shoot his marble, knocking him over and thereby causing him to lose the sight of one of his eyes. *Briese v. Maechtle*, 146 Wis. 89.....1:769

INNKEEPERS.

1. Care as to Goods of Salesman.

Where property is brought to a hotel for the purpose of sale or show, such as the goods of commercial travelers, the law does not hold an innkeeper to his strict liability, but only to the exercise of ordinary care and answerable for negligence. *Williams v. Norvell Shapleigh Hardware Co.*, — Okla. —, 116 Pac. 786.....1:321

INSURANCE.

Evidence as to insurance in action to recover for injuries by automobiles, see *Automobiles*, 10.

Store-keeper as insurer against accidents, see *Stores*, 3.

1. Employer's Liability Contract.—Construction.

Action on defendant's bond, whereby it promised to indemnify the plaintiff for any loss sustained by the cul-

pable negligence of its express messenger, in connection with the duties pertaining to the position, which term was defined by the bond to mean a failure to exercise the degree of care which men of ordinary prudence usually exercise in regard to their own affairs. The alleged breach of the bond was the negligence of the messenger in failing to keep the doors of his express car chained on the inside, which enabled robbers to enter the car, overpower him, and to steal from the car \$5,000. Verdict for defendant. *Held*:

(1) The negligence of the messenger, which would render the defendant liable, would be a failure on his part to exercise, in connection with the duties of his position, that degree of care which men of ordinary prudence usually exercise in regard to their own affairs of like gravity.

(2) The bond defines the standard of care to be exercised by the messenger, which the plaintiff could not enlarge, as against the defendant, by establishing rules for the conduct of its business; but a rule making it the duty of the messenger to keep the car doors chained was admissible in evidence for the purpose of showing what were the duties pertaining to his position.

(3) The mere fact that the messenger failed to chain the doors, if he did so, did not, as a matter of law, render the defendant liable: for it was a question for the jury whether, under all the facts which the evidence tended to show, he omitted to do anything in connection with the duties pertaining to his position which a man of ordinary prudence would usually do in his own affairs of like importance. *Great Northern Express Co. v. National Surety Co.*, 113 Minn. 162.....1:901

2. — Action.—Parties.

An Ohio statute (Rev. Stat. 1908, § 4993), which provides that "an action must be prosecuted in the name of the

real party and interests," does not bar the right of an employer's liability insurer to maintain an action at law in its own name against the party whose negligence caused a loss, based on a claim which it has paid in full, since by such payment it became subrogated to the right of action of the assured against the party whose negligence caused the injury. *Travelers' Insurance Co. v. Great Lakes Engineering Works Co.*, 184 Fed. 426.....1:747

3. — — Pleading.

In an action brought by an employer's liability insurer which had paid a loss incurred by an assured as the result of the death of an employee caused by the negligence of a third party, to recover against the latter under the right of subrogation, petition held to state a cause of action, as against a demurrer, under the provisions of Ohio Rev. Stat., 1908, § 5096, which provides that the allegations of a pleading shall be liberally construed with a view of substantial justice between the parties, and of § 5088, which gives the right to require pleadings to be made more specific and certain by amendment. *Travelers' Insurance Co. v. Great Lakes Engineering Works Co.*, 184 Fed. 426.....1:747

4. — Right of Subrogation.

An employer's liability insurer which has paid a loss sustained by a brewing company as the result of an injury to one of its employees and the death of another, who will without fault on their part, due to the blowing out of a cylinder head of a defective engine which was being installed by an engineering company in a refrigerating plant belonging to the brewing company, is entitled, under the right of subrogation, to maintain an action against the engineering company to recover a sum corresponding to the amount of the assured's right of action against the engineering company,

and such right of action by the insurance company is not affected by the fact that the liability of the brewing company in one case was statutory and existed in favor of certain persons only. *Travelers' Insurance Co. v. Great Lakes Engineering Works Co.*, 184 Fed. 426. 1:747

Before an employer's liability insurer, which has paid in full a loss sustained by an assured as the result of the death of an employee, is entitled to recover under the right of subrogation from the party whose negligence caused such death, it is not essential to such right of recovery that a judgment should have been recovered against the assured before the claim was paid, since the only effect of such judgment would be by way of evidence establishing liability. *Travelers' Insurance Co. v. Great Lakes Engineering Works Co.*, 184 Fed. 426....1:747

INTOXICATION.

Right of carrier to refuse to accept intoxicated passenger, see Carriers, 2.

JUDGMENT.

See Appeal, 6.

1. Entry; Discharge of Rule.

A discharge of a pending rule for a new trial is a prerequisite to the entry of judgment. *Walters v. American Bridge Co.*,—Pa.—.1:374

2. Explanation of Term by Court.

A county court judge may properly explain in writing the sense of an ambiguous word which he has used in giving judgment. *Lowery v. Walker*, L. R. App. Cas. 10 (1911).....1:215

3. Arrest of Judgment; Good Counts.

That a count in a declaration is fatally defective, will not sustain a motion in arrest where there are good counts upon which the verdict for plaintiff might have been based. *Blanchard v. Vermont Shade Roller Co.*, 84 Vt. 442.1:152

JURY.

Speed of Automobile as question for jury, see Automobiles, 7.

Capacity of one acting as superintendent, as question for jury, see Master and Servant, 3.

Question for jury as to physician's exercise of due skill, see Physicians and Surgeons, 3.

Workmen's Compensation, 11.

JUSTICE OF THE PEACE.

1. Jurisdiction; Time of Return of Summons; Waiver.

The appearance of a defendant by his attorney on the return day of a summons issued by a justice of the peace, and his consent to the adjournment of the case to an agreed date, operates as a waiver of the objection that the summons was made returnable in less time than was prescribed by statute. *Fanton v. Byrum*, 26 S. D. 366.1:812

LANDLORD AND TENANT.

Lease of amusement park to independent contractor as relieving owner of liability for injury caused by operation of miniature railway, see Amusements, 3.

1. Condition of Premises.—Duty to Disclose.

The duty of a landlord in respect to informing a tenant of any defects or dangerous conditions in the leased premises must be determined as of the time he let the property, and no subsequent knowledge of a defective condition will create that duty. *Hill v. Day et al.*,—Me.—.1:313

2. Proof of Landlord's Knowledge.

A finding that a landlord knew, or by the exercise of reasonable diligence, could have known of the defective condition of the framework supporting an iron grating in the sidewalk in front of his premises, is sustained by proof that the defect had existed for ten or fifteen years and that the landlord had

visited the premises monthly during that period to collect the rents. *McLaughlin v. Kelly, Jr.*, 230 Pa. 251:1:81

3.—Warranty as to Condition.

The lessor of a dwelling house does not impliedly warrant that the premises are reasonably fit for use, and, in absence of an agreement, is not bound to make repairs. *Hill v. Day et al.*,—Me. —.....1:313

There is no implied warranty that a house or piazza floor is safe and fit for occupancy at the time of demise, the doctrine of *caveat emptor* being applicable. *Walsh v. Schmidt*, 206 Mass. 405.....1:906

4.—Sufficiency of Evidence to Show.

In an action brought against a landlord to recover damages for injuries sustained by a tenant, caused by the breaking through of the floor in a back piazza while the tenant's wife was washing windows, evidence held to be insufficient to show an express warranty of soundness and strength by the landlord. *Walsh v. Schmidt*, 206 Mass. 405.....1:906

5.—Expression of Opinion.

A landlord's statement to a prospective tenant that the house "was good, safe and fit to live in," is merely an expression of an opinion, and cannot be made the basis of an action for damages for personal injuries caused by falling through a rotten floor in a back piazza of the leased premises. *Walsh v. Schmidt*, 206 Mass. 405. 1:906

6. Repairs—Duty of Landlord.

A landlord is under no implied contract or duty to keep premises in a safe condition while they are in the possession of a tenant. *Walsh v. Schmidt*, 206 Mass. 405.....1:906

7. Liability to Sub-tenant.

Mere neglect by a landlord to keep the leased premises in repair, does not, in the absence of fraud, render him

liable for injuries sustained by a sub-tenant caused by the fall of plaster from the ceiling of a room. *Hill v. Day et al.*,—Me.—.....1:313

Misfeasance of a landlord in making repairs, gratuitously undertaken, imposes no liability in favor of a sub-tenant, injured by his negligence, but who had no knowledge of such undertaking. *Hill v. Day et al.*,—Me.—.....1:313

A landlord is under no greater duty to a sub-tenant in respect to the safety of the demised premises than to the tenant. *Hill v. Day et al.*,—Me.—.....1:313

8. Injury to Pedestrian; Liability of Landlord.

A landlord is liable to a pedestrian who is injured because of a defect in the sidewalk in front of the demised premises which existed when the tenant's lease was renewed. *McLaughlin v. Kelly, Jr.*, 230 Pa. 251.....1:81

LEASE.

See Landlord and Tenant.

LICENSE.

Connection between absence of automobile license and injury, see Automobiles, 2.

LICENSEE.

See Infants.

Injury caused by savage horse in field crossed by public, see Animals, 1.

LIVE STOCK.

See Animals.

Injury caused by savage horse in field crossed by public, see Animals, 1. Carriage of, see Carriers, 17, 18.

MALICE.

See Trespass, 1.

MALPRACTICE.

See Appeal, 10; Physicians and Surgeons.

Liability of medical school, see Schools and Colleges, 1.

MANUSCRIPT.

As baggage, see Carriers, 10.

MASTER AND SERVANT.

See Employer's Liability Acts; Insurance; Workmen's Compensation.

Failure to charge that one causing injury was fellow servant where master still liable, see Appeal, 7.

Liability of owner of automobile for negligence of borrower, see Automobiles, 3.

Acceptance of benefits by servant as bar to recovery of damages for injury, see Constitutional Law, 1.

Admissibility of statements by injured employee to physician, see Evidence, 4.

Declaration as to condition of machine as binding servant who did not hear same, see Evidence, 5.

Fire escapes as place to work, see Fire Escapes, 1.

Liability of city for death of servant, see Municipal Corporations, 13.

Consent of parent to employment of child as barring right of recovery for negligent death, see Parent and Child, 2.

1. Existence of Relation; Effect of Fraud as to Age.

The fact that one employed as a fireman upon a locomotive who was killed by the explosion of the engine due to the failure of the engineer to perform his duty to keep a sufficient supply of water in the boiler, obtained his position by falsely representing that he was over 21 years of age, does not affect the relation of master and servant with respect to the master's statutory obligation respecting the safety of persons serving it, and therefore such misrepresentation is not material in an action to recover damages for the servant's death. *Hart, Adm'x v. New York Central & Hudson River R. Co.*, 205 N. Y. 317.....1:762

2. Superintendence.—Duty to Provide.

It is the duty of a master to furnish

a skilled superintendent to take charge of the construction of a raft and the mooring of the same in a stream having a rapid current, at a short distance above a falls, on which common laborers are directed to stand for the purpose of removing the false work underneath a bridge, and in case of the master's failure to provide such superintendence, he will be held liable for the death of the laborers caused by the action of the current in tearing the raft from its moorings and carrying them over the falls. *Engelking v. City of Spokane*, 59 Wash. 446, 110 Pac. 25.....1:142

3. — Capacity as Question for Jury.

In an action to recover for the death of a servant employed by an electric railway line, based upon a statute which gives a right of action against an employer for injuries to a servant on account of the negligence of any person intrusted with the duty of superintendence, or in the absence of such superintendent, on account of the negligence of any other person acting in that capacity with the consent of the employer, it is a question for the jury as to whether a fellow employee, in the absence of the superintendent, was acting in the capacity of superintendent with the employer's consent. *Greif, Adm'x v. Buffalo, Lockport & Rochester Ry. Co.*, 205 N. Y. 239.....1:44

4. Who is Vice Principal.

An engineer operating a detached locomotive engine and in absolute control of its movements, is a vice principal within the meaning of the Railway Law, § 42a., as amended by chapter 657, Laws of 1906, which provides that in actions against a railroad corporation to recover for personal injury to any person in its employ, "it shall be held in such actions that persons * * * who are intrusted by such corporation * * * with the authority of

superintendence, control, or command of other persons in the employment of such corporation * * * or with the authority to direct or control any other employee in the performance of the duty of such employee, or who have, as a part of their duty, for the time being, physical control or direction of the movement of a * * * locomotive engine * * *, are vice principals of such corporation * * * and are not fellow servants of such injured or deceased employee," and, therefore, the railroad company is liable for the death of a fireman employed on such engine caused by the explosion of the engine due to the failure of the engineer to perform his duty to keep a sufficient supply of water in the boiler. *Hart, Adm'x v. New York Central & Hudson River R. Co.*, 205 N. Y. 317.....1:762

5. Place to Work.—Knowledge of Master.

A master is presumed to know the dangers connected with the place provided for his servant's work. *Detterng v. Levy et al.*, 114 Md. 273..1:630

6. — Duty of Master.

The obligation of an employer to provide a safe place to work, does not include places made dangerous by the progress of the work. *Mejea v. Whitehouse*, 19 Haw. 159.....1:175

A master is not bound to furnish a fireman in a mill an absolutely safe place in which to work. *Acme Cement Plaster Co. v. Westman*, — Wyo. —, 122 Pac. 89.....1:408

An electric light company, which has merely contracted to furnish electricity to the owner of a private building, who has installed for himself the necessary wires and appliances, is not chargeable with negligence because of its failure to ascertain whether such wires were kept properly insulated, before sending an employee to remove from the building an unused gas-light

wire-tubing which ran in close proximity to the electric wires. *Byrd, Adm'x v. Pine Bluff Corporation*, — Ark. —.....1:470

A master's duty to use ordinary care to provide his employees with a reasonably safe place to work extends to ways for passing to and from work, or to secure drinking water, or to a place provided to relieve physical necessities. *Gregoric v. Percy-Lasalle Mining & Power Co.*, — Colo. —, 122 Pac. 7851:715

7. — Promise of Protection.

A superintendent in entire charge of a factory and its employees, has authority to promise protection to a servant at work in an unsafe place. *Blanchard v. Vermont Shade Roller Co.*, 84 Vt. 442.....1:152

8. — — Continuance of Servant to Work.

A servant who has been induced by a master's promise to continue to work in an unsafe place may do so without being guilty of contributory negligence and without assuming the risk of injury, so long as he may reasonably expect the master's promise to be kept, unless the danger is so obviously imminent and immediate that no reasonably prudent person would continue to work in that place. *Lynn v. Omaha Packing Co.*, 88 Neb. 720.....1:705

9. — Injuries by Revolving Shaft.

A master is not liable for injuries to a servant caused by being caught upon pins projecting from a revolving shaft, when using as a door a hole in a wall which was not intended for such use and which the master did not anticipate would be used as a place to work. *Straw v. Pittsfield Shoe Co.*, — N. H. —.....1:159

The question whether an employer is negligent in failing to protect a shaft, furnishing power to operate sewing machines, and located beneath

the table 23 inches from its edge and 8 inches from the floor, is a question for the jury. *Dettering v. Levy et al.*, 114 Md. 273.....1:630

In determining whether the location of an unguarded revolving shaft which furnishes power to operate sewing machines, is dangerous, so that a master may be charged with negligence in failing to guard it, the question is whether the operatives of the machines are likely to come into such close contact in the discharge of their duties as to place them in danger of injury. *Dettering v. Levy et al.*, 114 Md. 273. 1:630

10. — Location of Engine.

The placing of an engine used for breaking jams in a logging slide, so near the foot of the chute as to endanger the engineer, is such negligence as will render the employer liable for injuries sustained by him from a log which jumped the side of the chute. *Brooks, Scanlon, O'Brien Co. v. Fakema*, 44 Can. Sup. Ct. Rep. 412..1:417

11. — Unprotected Chute.

An employer who leaves unprotected an ore chute between the rails of a track running through an unlighted stope used for ingress and egress in a mine, cannot be said to be free from negligence as matter of law. *Gregoric v. Percy-Lasalle Mining & Power Co.*, — Colo. —, 122 Pac. 785.....1:715

12. — Statutory Duty to Guard Machinery.

The obligation imposed on an employer by Hurd's Rev. Stat., 1909, chap. 48, Sec. 1, to guard dangerous machinery, is absolute and not dependent upon any notice from the State inspector, as provided for in sections 23 and 25, which provide, in substance that, whenever, by the provisions of the statute it shall be the duty of any person to make any alterations or changes in machinery, the

same shall be completed within a reasonable time after notification by the chief State factory inspector. *Streeter v. Western Wheeled Scraper Co.*, 254 Ill. 244.....1:828

13. — — Practicability of Guard.

Evidence that it was practicable to guard a jointer having revolving knives, as required by statute, is shown by a witness who testified that he was a mechanical engineer and draughtsman, that he was familiar with the kind of jointer by which plaintiff was hurt and the manner of its operation, that such jointer was in use in the shop of the company by which he was employed, that a guard was used over the knives, and that such guard is a practical device. *Streeter v. Western Wheeled Scraper Co.*, 254 Ill. 244. 1:828

14. — — Sufficiency of Declaration.

A declaration in an action brought to recover damages for injuries sustained by an employee when his hand accidentally slipped into the knives of a jointer, described as a machine having whirling knives which cannot be so placed as not to be dangerous, and which alleges that such knives are unguarded, states a cause of action within Hurd's Rev. Stat., 1909, chap. 48, sec. 1, which requires that dangerous machinery shall be either guarded or so located as to remove the danger. *Streeter v. Western Wheeled Scraper Co.*, 254 Ill. 244.....1:828

15. — Question for Jury; Proximate Cause.

The question whether the master's failure to provide a safe place was the proximate cause of the death of an employee who fell into an open chute in an unlighted and unfamiliar passage of the mine is one for the jury. *Gregoric v. Percy-Lasalle Mining & Power Co.*, — Colo. —, 122 Pac. 785. 1:715

16. Tools and Appliances.—Inspection; Simple Tool.

A cant hook is not a "simple tool" within the meaning of the doctrine relieving the master from the duty of inspecting such tools for obvious defects. *Parker v. W. C. Wood Lumber Co.*, 98 Miss. 750.....1:644

17. — Explosion of Gun.

In an action brought to recover damages for personal injuries sustained by one employed in herding sheep, caused by the explosion of an alleged defective gun, *held*, that there was a substantial conflict in the evidence and that the evidence was sufficient to sustain the verdict. *Johnson v. Gary et al.*, 18 Idaho, 623, 111 Pac. 855..1:800

In an action brought to recover damages sustained by one employed in herding sheep, caused by the explosion of an alleged defective gun, *held*, that the instructions given by the court fairly covered the case and substantially included all of the proper instructions requested by appellants. *Johnson v. Gary et al.*, 18 Idaho, 623, 111 Pac. 855.....1:800

18. — Defect in Wheel; Sufficiency of Evidence.

A finding that the injuries sustained by one thrown from and run over by a track velocipede operated by a gasoline engine, were due to a badly worn wheel, is justified by proof that the car left the track just after turning a curve and when it was forced against the rail on which the defective wheel was running. *Gila Valley Globe & Northern Ry. Co. v. Hall*, 13 Ariz. 270, 112 Pac. 845.....1:362

19. Warnings and Instructions.—Duty to Give.

A number of workmen were employed in uncovering rock in a quarry operated by a railroad company, their duties not involving loading or handling the cars. Several loaded cars

awaiting removal were standing upon a spur track, near where they were at work. On account of a rain all but one of them entered the cars; he took shelter beneath a car, and was run over and killed when a freight train backed into the cars in the process of picking them up. His widow recovered a judgment; the jury finding that the railroad company was negligent in failing to give proper warning of the approach of the train. *Held*, that the defendant owed no duty to the deceased to give such warning, and that his own conduct constituted negligence as a matter of law. *Carey v. Chicago, Rock Island & Pacific Ry. Co.*, 84 Kan. 274, 114 Pac. 197..1:927

An employer is not guilty of negligence in failing to instruct an adult employee whose duty it is to oil the machinery of a rock crusher while in motion, of the obvious danger of allowing his hand or arm to be caught in unguarded parts of the machinery. *Bresette v. E. B. & A. L. Stone Co.*, — Cal. —, 121 Pac. 312.....1:869

20. — Ignorance of Master as to Danger.

A railroad company is not liable to an employee directed to unload timbers which had been freshly treated with creosote, the fumes from which poisoned his system and resulted in eczema, where the company neither knew nor by the exercise of ordinary diligence could have known that such injuries were liable to result. *Pinkley v. Chicago & Eastern Ill. R. Co.*, 246 Ill. 370.....1:480

21. — Hidden or Unknown Dangers.

In an action brought to recover damages sustained by a workman while engaged in digging a ditch for sewer purposes, evidence held to justify a finding that the employer, who knew of the dangerous condition of the soil, was guilty of negligence in failing to warn the servant who was ignorant of

its condition. *Tomaselli v. Sacco*, 194 Fed. 398.....1:139

A master may be liable for negligently exposing his servant to a hidden danger, which is known to the former but of which the latter is ignorant, incurred by the latter in doing work in the course of his employment, although the dangerous situation arose from the conduct of strangers. *Medlin Milling Co. v. Boutwell*, — Tex. —.1:178

22. — Poison; Knowledge of Servant.

A master is not liable for a failure to warn his servant engaged in handling timber recently treated with creosote that the fumes arising therefrom will cause blisters, if the servant is already aware of that fact. *Pinkley v. Chicago & Eastern Ill. R. Co.*, 246 Ill. 370.....1:480

23. — Duty of Servant to Heed.

It is the duty of an employee of an electric light company, who has been warned of the danger of permitting gas fixtures, which he is engaged in removing from a building, to come in contact with electric light wires, to take the necessary precautions for his own safety. *Byrd, Adm'x v. Pine Bluff Corporation*, — Ark. —.....1:470

24. Fellow Servants.—Who Are.

The superintendent of a factory in attempting to fulfill a promise to protect a servant at work in an unsafe place, is not a fellow servant, where the protection is to be secured by an exercise of his authority as superintendent. *Blanchard v. Vermont Shade Roller Co.*, 84 Vt. 442.....1:152

A foreman who has charge of a gang of laborers engaged in excavating a perpendicular bank of earth, is a fellow servant of the laborers under him, and the master is not liable to a laborer who is injured by the fall of the bank when working in a dangerous place at the direction of the fore-

man. *Mejea v. Whitehouse*, 19 Haw. 1591:175

A foreman in charge of a gang of laborers engaged in the construction of a branch line of a railroad, with power to hire and discharge men, is a fellow servant with the men under him with respect to orders given them in the management of a derrick used, pursuant to an order of his superior, for the removal of wreckage along the main line of the road, and so a servant who is injured while following such orders cannot recover of the master. *Peters v. Michigan Central R. Co.*, 165 Mich. 217.....1:266

25. — Injury by.

At common law a servant who is injured by the carelessness or negligence of a fellow servant has no remedy against the common employer. *Mejea v. Whitehouse*, 19 Haw. 159 1:175

The careless act of a fellow servant in permitting a truck to fall into an elevator well at a time when a co-employee is engaged in cleaning the pit, is not the sole proximate cause of the latter's injury, where the superintendent failed to fulfill his promise to leave the elevator in place for the employee's protection. *Blanchard v. Vermont Shade Roller Co.*, 84 Vt. 442 1:152

26. — — Dressing Wound.

Where defendant's agent told an employee of the defendant to wash the bleeding finger of another employee, and also told him to look for bandages in a medicine chest containing medicines for first aid for persons injured in the factory and the employee so directed negligently used the contents of a bottle of carbolic acid in dressing the wound, by reason of which the finger was gangrened and had to be amputated, *held*, that a jury could infer that the use of a medicine found within the medicine chest was within

the authority given by the defendant's agent to the employee to dress the wounded finger. *Croghan v. Schwarzenbach*, — N. J. Law, —.....1:922

27. — — Sportive Act.

A milling company which employs a large number of servants is not liable for injuries to a new employee inflicted by its officers and employees in a sportive attempt to place the new employee across a barrel for the purpose of paddling him, as an "initiation" into the service of the company, although the custom of initiating new officers and employees had existed for a number of years with the knowledge and acquiescence of the officers of the company, such act being wholly without the scope of the authority of either the officers or the employees. *Medlin Milling Co. v. Boutwell*, — Tex. —..... 1:178

28. — — Statutory Liability; Constitutionality.

A State statute making railroad corporations, engaged in mining, liable for personal injuries to employees, due to the negligence of a fellow servant, does not deny the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States. *Aluminum Co. of America v. Ramsey*, 222 U. S. 251..... 1:184

29. — — Competency of Servant.

The fact that a fellow servant failed, when called upon, to blow out a candle, the flame of which caused an explosion of gasoline, causing injury to plaintiff who was busy in fixing certain pipes under gasoline tanks on a launch and whose hands were necessarily engaged in holding a wrench upon a nut, does not show the former to have been so unsafe or incompetent an employee as to render the master liable. *Allen v. Knight's Island Consolidated Copper Co.*, 3 Alaska, 651.....1:369

30. — Right to Benefit of Indemnity Contract.

A contract between the government and one engaged in building a ditch requiring the latter to "provide such precautions as may be necessary for the prevention of accidents to life or property and shall assume all responsibility of all damages or costs resulting therefrom," does not constitute a contract of insurance for the benefit of a laborer who is injured by the negligence of a fellow servant. *Mejea v. Whitehouse*, 19 Haw. 159....1:175

31. — Abolition of Fellow-servant Rule; Validity.

It is within the power of the Legislature to abolish the fellow-servant rule and the law of contributory negligence, as applied to the liability of a master for an alleged negligent injury sustained by his servant. *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271..... 1:517

32. Assumption of Risk.—Distinguished from Contributory Negligence

The doctrine of assumption of risk is distinct from that of contributory negligence, and rests upon an implied or express agreement, from the circumstances of the employment, that the master shall not be liable for any injury incident to the service resulting from a known or obvious danger arising in the performance of the service. *Southern Turpentine Co. v. Douglass*, 61 Fla. 424.....1:788

33. — What Risks Assumed.

An employee assumes all the ordinary risks of his employment and extraordinary risks of which he has knowledge, and all obvious risks existing at the time of his employment or coming into existence subsequently. *Streeter v. Western Wheeled Scraper Co.*, 254 Ill. 244.....1:828

A common laborer who has been directed, with others, to construct a raft

and float it in the current of a stream a short distance above a falls, on which he, with the others, was to stand for the purpose of removing the false work underneath a bridge in process of construction by defendant, does not assume, as matter of law, the risk of injury caused by the action of the current upon the raft and mooring line, so as to bar a recovery by his administratrix for his death caused by the raft being torn from its fastenings, thereby causing him to be carried over the falls. *Engelking v. City of Spokane*, 59 Wash. 446, 110 Pac. 25..1:142

An employee engaged in cleaning out an elevator pit in reliance upon an undertaking of the superintendent to protect him in respect to the operation of the elevator, does not assume the risks attending the ordinary use of the elevator. *Blanchard v. Vermont Shade Roller Co.*, 84 Vt. 442 1:152

One inexperienced in the use of a track velocipede, does not, as matter of law, assume the risk of injury from a worn wheel, where the danger was not known or plainly observable. *Gila Valley Globe & Northern Ry. Co. v. Hall*, 13 Ariz. 270, 112 Pac. 845..1:362

The failure of a fellow servant to extinguish, upon request, a candle, the flame of which caused an explosion of gasoline, is a risk assumed by one employed as engineer of a gasoline launch, who, at the time of the injury, was engaged in fixing certain pipes under the gasoline tanks so that he was unable to extinguish the flame himself. *Allen v. Knight's Island Consolidated Copper Co.*, 3 Alaska, 651 1:369

A sewing machine operator, looking beneath the table for a lost needle wrench, does not, as matter of law, assume the risk of injury from having her hair caught on an unprotected smooth shaft at least 10 inches away. *Dettering v. Levy et al.*, 114 Md. 273 1:630

An employee does not assume the risk of danger from an open and unlighted chute in a passage of the mine with which he is unfamiliar. *Gregoric v. Percy-Lasalle Mining & Power Co.*, — Colo. —, 122 Pac. 785....1:716

Subject to the rule that he does not assume risks created by reason of the master's negligence, a servant cannot recover for injuries resulting from defective or dangerous machinery or appliances, where the risks are incident to the employment, or are known, or ought to be known, by him. *Southern Turpentine Co. v. Douglass*, 61 Fla. 424 1:788

Where the master and servant are possessed of equal knowledge of defects in machinery used and dangers incident to its use, the servant assumes the risk, where he is normally competent to act for himself. *Southern Turpentine Co. v. Douglass*, 61 Fla. 424 1:788

One who voluntarily accepts employment as oiler of a rock crushing machine, which he is instructed how to oil when the machinery is in motion, and continues to perform his duties for a period of nearly two months without making any complaint as to the conditions, assumes the risk of injury from having his arm caught in an unprotected gearing while attempting to oil the machinery when it was in operation. *Bresette v. E. B. & A. L. Stone Co.*, — Cal. —, 121 Pac. 312 1:869

34. — Failure to Furnish Safe Place to Work.

A servant does not assume the risk of accident and injury due to the failure of the master to exercise reasonable care in furnishing him with a reasonably safe place to do his work; but he does assume all risks which are necessarily incident to his employment, or which are obvious or known

to him. *Southern Turpentine Co. v. Douglass*, 61 Fla. 424.....1:788

35. — — Master's Violation of Statute.

A servant who continues in his employment in a factory with knowledge of his master's violation of Hurd's Rev. Stat., 1909, chap. 48, sec. 1, which imposes upon employers the duty of guarding dangerous machinery, and with knowledge of the consequent danger to himself, does not assume the risk of injury from such violation. *Streeter v. Western Wheeled Scraper Co.*, 254 Ill. 244.....1:828

36. — After Notice of Danger or Promise to Repair.

A servant who calls attention to the danger of the position assigned to him and asks for protection against injury, cannot be said, as matter of law, voluntarily to assume the risk of injury from the danger indicated. *Brooks, Scanlon, O'Brien Co. v. Fakkema*, 44 Can. Sup. Ct. Rep. 412. 1:417

Where a master has expressly promised to repair a defect, the servant does not assume the risk of an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance. *Lynn v. Omaha Packing Co.*, 88 Neb. 720 1:705

37. — Evidence as to Knowledge of Dangers.

In an action to recover damages for personal injuries caused by the hair of the operator of a power sewing machine being caught on an unguarded revolving shaft as she was looking beneath her table to find a lost wrench, it is competent to show whether the drawing forces of the shaft, as shown by experts, were of a character generally known to untrained persons, as bearing on the question of assumed risk. *Dettering v. Levy et al.*, 114 Md. 273.....1:630

38. — As Defense; Pleading.

Assumption of risk may be made available as a defense in actions for damages by a servant for injuries received in the course of his employment; but it is an affirmative defense, and should be specially pleaded and proven by the defendant. *Southern Turpentine Co. v. Douglass*, 61 Fla. 424. 1:788

39. Contributory Negligence of Servant.—In General.

An experienced machinist sent aloft on a windy day to remedy a defect in the operation of a windmill, who failed to lash the mill tight enough to prevent the piston rod from working, is guilty of negligence contributing to his injury when, to prevent himself from falling, he placed his hand where it was crushed by a downward stroke of the piston. *Irons v. Greene*, 32 R. I. 383.....1:172

An engineer who reasonably believes that it is his duty to be at his engine, set at the bottom of a logging slide for use in breaking jams, and who is injured by a log which jumped the side of the chute and rolled down the mountain, is not chargeable with contributory negligence because he remained at his post. *Brooks, Scanlon, O'Brien Co. v. Fakkema*, 44 Can. Sup. Ct. Rep. 412.....1:417

A sewing machine operator, whose hair was caught on an unprotected shaft located at a distance of 10 inches from her head, as she was looking beneath the table of her machine for a lost needle wrench, is not guilty of contributory negligence, as matter of law, because she did not borrow a wrench from another operator or look for the lost wrench in a different manner. *Dettering v. Levy et al.*, 114 Md. 273 1:630

40. — Effect of Statute.

Chapter 352, Laws 1910, in amendment of § 202a of the Labor Law,

which relieves the plaintiff in an action for injuries alleged to have been caused by negligence, from the burden of showing want of contributory negligence and making contributory negligence a matter of defense which must be pleaded and proved by defendant, is not retroactive in effect. *Greif, Adm'x v. Buffalo, Lockport & Rochester Ry. Co.*, 205 N. Y. 239.....1:44 41. — Question for Jury.

In an action to recover damages for the death of a servant who received injuries from which he subsequently died, caused by falling from the top of a trolley car on which he was assisting another in replacing a new pole, after the new pole had come into contact with a charged trolley wire, the question as to the contributory negligence of the servant is for the jury. *Greif, Adm'x v. Buffalo, Lockport & Rochester Ry. Co.*, 205 N. Y. 239..... 1:44

The question whether a servant injured by falling while using a defective cant hook was guilty of contributory negligence in failing to discover the absence of a bolt fastening the cuff to the hook, is one for the jury. *Parker v. W. C. Wood Lumber Co.*, 98 Miss. 750.....1:644

In an action for death resulting from personal injuries, the question of contributory negligence is for the jury, where from the facts established fair-minded men might honestly draw different conclusions. *Gregoric v. Percy-Lasalle Mining & Power Co.*, — Colo. —, 122 Pac. 785.....1:715

42. Notice of Injury.

The notice required to be served, under section 201 of the Labor Law, which provides that no action for injuries shall be maintained unless notice of the time, place, and cause of the injury is given to the employer, is sufficient, where it states as follows:

"You will please take notice, that

on the 19th day of January, 1909, about 11 o'clock p. m., while I was in your employ as watchman and helper at your car barn and repair shop, situate in the town of Gates, west of the city of Rochester, I was injured by falling from the top of a car which was at the time standing in said barn for repairs. The said car was brought into the barn with a damaged trolley pole, and the repairs consisted in taking out that trolley pole and inserting another. The car was run into the barn on a track having a trolley wire over it, and I was sent to the top of the car to make the change of trolley poles. The power, or electric current, is supposed to be turned off from the trolley wire in said barn and from said car at such a time when repairs are taking place. After the old trolley pole was removed, and while I was standing on the top of the car, a new trolley pole was handed to me, and as I attempted to insert it in the socket it touched the trolley wire and I received a shock of electricity, which threw me to the ground, injuring my spine so that I am paralyzed and helpless." *Greif, Adm'x v. Buffalo, Lockport & Rochester Ry. Co.*, 205 N. Y. 2391:44

43. Violation of Statute as Affecting Right of Recovery.

The collateral fact that the plaintiff and the defendant are engaged in violating the law does not prevent the former from recovering damages of the defendant for an injury negligently inflicted, unless the unlawful act contributed to produce the injury.

(a) A servant who is injured by the negligent conduct of an incompetent fellow servant, the incompetency being unknown to him, may recover from the common master damages arising from his breach of duty in knowingly employing and retaining the incompetent servant, where the proof shows that at the time of the injury

the plaintiff, the negligent and incompetent fellow servant, and the master were all three engaged together in the violation of a penal statute of this State, viz., the statute making penal the pursuit of one's business or work of ordinary calling on the Lord's Day. *Hughes v. Atlanta Steel Co.*, 136 Ga. 429 1:429

44. Authority of Servant to Employ Physician; Liability of Master.

Where a corporation operates a mining plant, and does not authorize its superintendents to employ a physician at the expense of the corporation to attend an employee injured by the machinery of the plant, the law does not imply such authority, at least, where there is testimony that such authority was not given or contemplated by those exercising the rights of the corporation. The liability of the corporation for negligence that proximately injures an employee may extend to medical services rendered to an injured employee, but this does not create a contract liability for such services. *Atlantic Refining Co. v. Leffingwell & Berry*, 61 Fla. 101..1:1

45. Actions.—Burden of Proof.

An employee who brings an action to recover damages for personal injuries alleged to have resulted from some negligent act of the master has the burden of proof. *Byrd, Adm'r v. Pine Bluff Corporation*, — Ark. — 1:470

46. — Pleading; Construction; Sufficiency.

Where it is alleged in the complaint that because of the personal injury received a total loss of earning capacity resulted, and that such injury was the result of the negligence of the defendants, a cause of action is stated, and in such a case the amount of damages sustained depends on the nature of the injury. If the evidence

introduced without objection established the allegations as to bodily pain, mental anguish, and incapacity to earn money, the jury would be justified in finding a verdict for the plaintiff. *Johnson v. Gary et al.*, 18 Idaho, 623, 111 Pac. 855.....1:800

A complaint in an action for personal injuries, which contains a general allegation of the absence of knowledge on the part of the injured employee, of the danger involved in reaching over an unguarded gear wheel to oil moving machinery, is demurrable, where the specific allegations show that he must have known of the defects and the danger therefrom. *Bresette v. E. B. & A. L. Stone Co.*, — Cal. —, 121 Pac. 312.....1:869

In an action by a servant for personal injuries, no consideration for the master's promise to protect the servant in his work need be alleged or proved. *Blanchard v. Vermont Shade Roller Co.*, 84 Vt. 442.....1:152

An averment in a declaration by a servant in an action for personal injuries, that the master failed to take certain action for the servant's safety as he had agreed, promised and assumed, does not make the count one in assumpsit and, therefore, objectionable as improperly joined with the other counts. *Blanchard v. Vermont Shade Roller Co.*, 84 Vt. 142....1:152

Negligent construction of a coal bin is sufficiently charged in a complaint in an action brought by an employee to recover damages for personal injuries, which alleges that, through the negligence of defendant, plaintiff sustained injury by the falling of a coal bin belonging to defendant, which burst or collapsed because it was built, constructed, and maintained in an unsafe, defective, and insecure manner by defendant, in that the upright posts supporting the same were not fastened or secured by nails, screws, bolts or in any other manner, and were not

able to withstand the lateral pressure to which they were subjected by the weight of the coal placed in such bin. *Acme Cement Plaster Co. v. Westman*, — Wyo. —, 122 Pac. 89.....1:408

47. — Instructions.

In an action brought to recover damages for personal injuries sustained by a fireman in a mill caused by the collapse of a coal bin, in which the petition charged that the bin was built, constructed, and maintained, in an unsafe, defective, and insecure manner in that the upright posts supporting the same were not fastened, or secured by nails, screws, or bolts, or in any other manner, the burden rests on the plaintiff to prove not only that the bin fell and injured him, but also that it fell by reason of some defect alleged in his petition; and, therefore, an instruction to the jury that the fall of the bin created a presumption of negligence on the part of the employer, was erroneous. *Acme Cement Plaster Co. v. Westman*, — Wyo. —, 122 Pac. 891:408

In an action brought by a fireman employed in a mill to recover damages for personal injuries caused by the collapse of a coal bin due to the alleged insufficiency of certain posts, an instruction to the jury that if the employer knew the peril to which the servant would be exposed, and the posts were not secured by nails, screws or bolts, or in any other manner, and if the plaintiff received injury as alleged, and the employer did not give notice of the defects in the bin to the servant, and if the servant at the time of receiving his injury was in the exercise of ordinary care, then the employer is liable in damages, is erroneous, in that it assumed that the servant was exposed to peril, that the posts were not secure in some way, and that it would lead the jury to conclude that the master was liable for its fail-

ure to secure the posts with nails, screws or bolts, especially where the jury were also instructed that, if the posts were otherwise sufficiently secured to make the place reasonably safe, the employer would not be liable. *Acme Cement Plaster Co. v. Westman*, — Wyo. —, 122 Pac. 89.....1:408

48. — Question for Jury.

In an action to recover damages for the death of a servant who received injuries from which he subsequently died, caused by falling from the top of a trolley car on which he was assisting another in replacing a new pole, after the new pole had come into contact with the trolley wire which was charged with electricity, the question as to the cause of the shock which produced the accident was for the jury. *Greif, Adm'x v. Buffalo, Lockport & Rochester Ry. Co.*, 205 N. Y. 239..1:44

49. Master's Liability to Third Persons.

The master is liable for the negligence of his servant in the performance of a duty to the master within the scope of the servant's employment. *Jenkins v. Montgomery*, 69 W. Va. 795. 1:58

MINIATURE RAILWAY.

Lease of amusement park to independent contractor as relieving the owner of liability for injury caused by operation of miniature railway, see *Amusements*, 3.

MOTOR VEHICLES.

See *Automobiles*.

MUNICIPAL CORPORATIONS.

See *Automobiles*; *Highways*.

Liability for contaminated water supply, see *Waters*, 1.

1. Streets and Sidewalks.—Control.

There is a broad presumption, where a walk is shown to have been constructed in a populous part of a city, that

the city built or assumed control over the walk. *Roney v. City of Des Moines*, 150 Iowa, 447.....1:461

2. — Condition.—Notice.

Notice to a city, either actual or constructive, of the defective condition of a sidewalk must be shown to hold the city liable for injuries caused by some defect, where the walk was originally constructed in good condition. *Roney v. City of Des Moines*, 150 Iowa, 447.....1:461

In an action against a city to recover for personal injuries to a pedestrian caused by the defective condition of the covering of a coal hole in the sidewalk, it is proper to instruct the jury that the defendant, as a municipal corporation, obtains notice and knowledge through its officers and representatives, and if such officers and representatives as were charged with the duty of constructing and maintaining the sidewalk at the time and place of the accident, or of inspecting the same and of keeping it in proper condition, received notice of the improper construction or defective condition of the walk where the injury occurred, such notice is imputable to the city. *Roney v. City of Des Moines*, 150 Iowa, 447.....1:461

A city is liable for negligent injuries caused by a defect in a sidewalk, which, when originally constructed was unsafe, although it did not construct the walk through its own agencies and had no knowledge of its defective condition. *Roney v. City of Des Moines*, 150 Iowa, 447. 1:461

3. — — Coal Hole.

In an action against a city to recover damages for injuries to a pedestrian caused by the improper construction and fitting of the covering of a coal hole in a sidewalk located in a populous part of a city, evidence held to justify a finding that the sidewalk

was originally constructed in an unsafe manner. *Roney v. City of Des Moines*, 150 Iowa, 447.....1:461

4. — — Ice and Snow.

It is a fact of common knowledge that a snowplow used in clearing snow from city streets does not, and cannot clear the snow in the center of the walk as well as it does at the edges, where pedestrians have not trodden. *Jefferson v. City of Sault Ste. Marie*, 166 Mich. 340.....1:598

The danger of falls on slippery places on the sidewalks of a city is one against which a pedestrian must ordinarily protect himself, because a city is under no obligation to remove either ice or snow. *Jefferson v. City of Sault Ste. Marie*, 166 Mich. 340.....1:598

A city not being obliged to remove snow and ice from its streets, cannot be held liable to a pedestrian who was injured by slipping on an icy sidewalk thereby breaking her leg, because of a ridge of snow and ice left in the middle of the walk by a snowplow used by the city in clearing its sidewalks, due to the fact that the snow in the center of the walk had been trodden down by people more than at the edges. *Jefferson v. City of Sault Ste. Marie*, 166 Mich. 340..1:598

5. — — Removal of Obstruction; Peanut Roaster.

It is the duty of municipal authorities to remove an obstruction from a street when it possesses the character of permanency, and in case of their failure to do so the municipality may be charged with negligence in case of injury arising therefrom, and the fact that such obstruction rests upon wheels and may readily be moved from place to place does not in any true sense make it a highway vehicle. *Frank v. Village of Warsaw*, 198 N. Y. 463. 1:917

6. — — Explosion of Peanut Roaster.

A village is liable for personal in-

uries to one caused by the explosion of a peanut roaster which, to the personal knowledge of the trustees, had obstructed the highway for many weeks before the accident. *Frank v. Village of Warsaw*, 198 N. Y. 463. 1:917

7. Blasting; Liability to Traveler.

A municipal corporation, although not authorized by its charter or the general laws of the State to operate a rock quarry within its corporate limits, is not liable to a traveler injured when her horse took fright at blasts set off by agents of the city in a quarry near the highway, where rock was being obtained for use on the streets. *City of Radford v. Clark*, — Va. —.....1:909

The fact that a municipality permitted its employees to discharge blasts in such a manner as to constitute a public nuisance, in a rock quarry, located 65 feet from the highway, does not render it liable to a traveler who was injured in consequence of her horse taking fright at a succession of blasts, where the blasting was not done in the performance of a duty imposed upon the municipality by law. *City of Radford v. Clark*, — Va. —. 1:909

8. — — Failure to Pass Ordinance Prohibiting.

A city cannot be held liable for its failure to pass an ordinance to prevent or safeguard the firing of blasts in a rock quarry 65 feet from its streets and upon private property. *City of Radford v. Clark*, — Va. —. 1:909

9. — — Sufficiency of Complaint; Statute.

The plaintiff, while lawfully on private property, was injured by being struck by a piece of rock hurled by the blasting, in a negligent manner, of rocks and boulders by the defendant

in one of its streets. He brought this action to recover damages for his injuries, but did not give the notice provided for by § 768, R. L. 1905. *Held*, that the action is within the statute, and that the complaint does not state a cause of action. *Mitchell v. Village of Chisholm*, 116 Minn. 323. 1:199

10. Liability for Damage by Water.— Insufficiency of Channel.

Where a city diverts a stream of water from its natural channel and undertakes to convey the same by means of an artificial channel or canal, it should be held liable for the exercise of reasonable care and diligence in constructing a channel of sufficient size to carry the volume of water that may be reasonably anticipated or expected to flow down the same and for the maintenance of the same in a reasonably safe condition. *Willson v. Boise City*, 20 Idaho, 133, 117 Pac. 115. 1:203

A municipality will not be exempt from liability for damages on account of failure to maintain a sufficient artificial channel to carry off the water of a stream that it has diverted from its natural channel, merely on the grounds that the flooding and overflow was caused by an unusually heavy rainfall or cloud-burst the like of which has not usually occurred, where it appears that a number of such rainfalls or cloud-bursts have occurred in the same locality within the last preceding 15 or 20 years. *Willson v. Boise City*, 20 Idaho, 133, 117 Pac. 115. .1:203

11. — "Act of God."

A rainfall or cloud-burst which has irregularly and infrequently occurred a number of times within the memory of man in a particular locality, and has caused heavy freshets in a particular stream, is a thing that can reasonably be expected to occur again, and is therefore not classed as vis ma-

for or the "act of God," for which the law of negligence and damages does not hold any human agency responsible. *Willson v. Boise City*, 20 Idaho, 133, 117 Pac. 115.....1:203

A heavy rainfall or cloud-burst and consequent floods unprecedented and so extraordinary as to have been beyond reasonable anticipation, and such as had not been known to occur in the locality for a long series of years, is classed in law as the "act of God," and no liability attaches to any one for the damages done thereby. *Willson v. Boise City*, 20 Idaho, 133, 117 Pac. 115.....1:203

12. Ditch to Lay Pipe as Nuisance; Liability of Abutting Owner.

The opening of a ditch in a public street for the purpose of laying a pipe to connect a dwelling with the water main is not *per se* a nuisance, and does not make the owner of the house liable to a person injured by falling into the ditch, unless such owner has been guilty of negligence. *Jenkins v. Montgomery*, 69 W. Va. 795.....1:58

13. Liability for Death of Servant.

In constructing a bridge over a stream as a portion of its highway system, a municipal corporation acts in its ministerial capacity, and is, therefore, liable for the negligent death of a common laborer employed in the work. *Engelking v. City of Spokane*, 59 Wash. 446, 110 Pac. 25. 1:142

14. Location of Fire Plug; Misdirection.

The placing by urban authorities, in violation of their statutory duties, of a plate in the street with a misleading direction as to the situation of the fire plug, is an act of misfeasance rendering them liable to one whose building was consumed by fire because of delay in promptly locating the fire plug. *Dawson & Co. v. Bingley Urban Council*, 2 K. B. 149 (1911).....1:220

NEGLIGENCE.

Contributory negligence of patron at amusement park, see Amusements, 5.

Contributory negligence of patron at bathing resort, see Amusements, 7.

Contributory negligence as defense to action to recover for injury inflicted by running of automobile, see Automobiles, 6.

Negligence on part of carrier as inferred from slamming of door on passenger's hand, see Carriers, 3.

Statute imposing liability for injury caused by explosion of oil sold in violation of law as abrogating defense of contributory negligence, see Explosions, 1.

Validity of statute making railroad companies engaged in mining liable for personal injuries to employee due to negligence of fellow servant, see Master and Servant, 22.

Distinction between assumption of risk and contributory negligence, see Master and Servant, 32.

Contributory negligence of servant, see Master and Servant, 39 et seq.

Liability for injuries in stores, see Stores.

NOTICE.

Sufficiency of notice of injury sustained by servant, see Master and Servant, 42.

Of condition of streets, see Municipal Corporations, 2.

NUISANCE.

1. Plant Emitting Fumes and Gases.

A plaintiff sustains the burden of proof when he shows that at the time his plants were destroyed and damage suffered, the defendant's factory was freely emitting fumes, gases, and acids, which are destructive of plant life, and that the wind was blowing the fumes, etc., towards his premises, some 900 feet distant, and that there was no other known agency of destruction ex-

isting in the vicinity. *Wichers v. New Orleans Acid & Fertilizer Co.*, 128 La. 1011 1:697

Obstruction in highway, see *Highways*, 2.

Opening of ditch to lay pipe to connect dwelling with water main as nuisance, see *Municipal Corporations*, 12.

OIL.

Liability for injury caused by explosion of oil sold in violation of law, see *Explosions*, 1.

PARENT AND CHILD.

Liability of owner of automobile for negligence of borrower, see *Automobiles*, 3.

See *Infants*.

1. Liability of Parent for Tort of Child.

A parent may be liable for the torts of a minor child committed with his knowledge and acquiescence. *Thibodeau v. Cheff*, 24 Ont. L. Rep. 214. 1:378

In an action against a father to recover damages caused by the destruction of property by a fire set by his child, a finding in favor of the plaintiff is sustained by evidence that the child who set the fire was an imbecile boy, about sixteen years of age, that by reason of the weakness of his intellect he was unable to understand the difference between right and wrong, that it was dangerous for the father, in whose custody the child lived, to permit him to be at large without being watched by reason of his habit of smoking and his frequent use of matches to kindle small fires, and that the father knew of his character and habits, and of the fact that he had previously set fires. *Thibodeau v. Cheff*, 24 Ont. L. Rep. 214.... 1:378

2. Action for Death of Child; Consent to Employment.

In an action by a father for the

negligent death of his son while employed in a factory, the fact that he consented to such employment is not a bar to a recovery, notwithstanding it was his duty under the statute to have had his son at school. *Smith v. Marion Fruit Jar & Bottle Co.*, 84 Kan. 551, 114 Pac. 845.....1:620

3. Services of Child; Damages to Employer as Counterclaim.

Damages to property caused by the wilful acts of a minor employee in setting fires on the property of a third person which spread to the lands of the employer, and negligence in driving the latter's team, cannot be interposed as a defense and counterclaim to an action brought by the parent of the minor to recover compensation for the minor's services. *Fanton v. Byrum*, 26 S. D. 366.....1:812

PARTIES.

Parties to action based on Employer's liability contract, see *Insurance*, 2.

PHYSICIANS AND SURGEONS.

Negligence of servant in dressing wound of fellow servant, see *Master and Servant*, 26.

Authority of servant to employ physician, see *Master and Servant*, 44.

1. Malpractice.—Care and Skill.

In an action against a physician to recover for injuries resulting from the negligent and unskillful use of instruments in the delivery of a child, it is no defense that the physician had knowledge and skill required for the practice of his profession, and that the mistake made was only an error of judgment. *Kline v. Nicholson*, 151 Iowa, 710..... 1:290

2. — — Test as to Treatment.

In determining whether treatment administered to a patient by a practitioner of the osteopathic school was careless, negligent and unskillful, the

treatment must be judged by the methods and practice of that school. *Atkinson v. American School of Osteopathy*, — Mo. —.....1:275

In an action for malpractice brought against a physician practicing in a small country town, an instruction that if defendant possessed and employed in the treatment of his patient such reasonable skill and diligence as were ordinarily exercised by the members of his profession at and in localities similar to that in which he practiced, he would not be responsible for the result of the operation, is not error. *Kline v. Nicholson*, 151 Iowa, 710. 1:290

3. — Question for Jury.

In an action against a physician to recover for malpractice, it is a question for the jury to determine, whether in treating the patient, he used the care, judgment, and skill required. *Kline v. Nicholson*, 151 Iowa, 710. 1:290

4. — Sufficiency of Evidence.

In an action for negligence of a physician in attending a woman at child birth and in treating her afterwards, evidence held to be sufficient to warrant a recovery. *Kline v. Nicholson*, 151 Iowa, 710.....1:290

5. — Evidence as to Injury; Question for Jury.

Evidence of persons skilled in observing the nature and probable results of certain internal injuries and of those who have experienced the effects which have actually followed therefrom, is sufficient, in an action for malpractice, to take the question of the existence of the injury alleged to the jury, as against an objection that the history of the alleged injury is incredible and impossible. *Atkinson v. American School of Osteopathy*, — Mo. —..... 1:275

PLEADING.

Pleading in action to recover damages for injuries by automobile, see *Automobiles*, 8.

Pleading in action for loss of baggage, see *Carriers*, 15.

Pleading *ad damnum* clause, see *Damages*, 1.

Pleading in action based on employer's liability insurance contract, see *Insurance*, 3.

Arrest of judgment when declaration fatally defective but others good, see *Judgment*, 3.

Sufficiency of declaration in action to recover damages for injuries caused by master's failure to guard dangerous machinery, see *Master and Servant*, 14.

Necessity of pleading assumption of risk as defense, see *Master and Servant*, 38.

See *Master and Servant*, 46.

Sufficiency of complaint in action by one struck by rock hurled by blast, see *Municipal Corporations*, 9.

Variance between pleading and proof, see *Trial*, 7.

1. Sufficiency.

The petition in an action brought to recover damages sustained by a person upon whom a door fell while she was in a building attending to the storage of her furniture, is defective for failure to allege that she was on the defendant's premises at the time of the alleged injury, that she was on such premises lawfully, that the injury was sustained by reason of the fault of the defendant, and that she was not at fault herself. *Lynch v. American Brewing Co. et al.*, 127 La. 848.....1:804

2. Demurrer.

The action of the court in sustaining a demurrer generally to a plea which, because addressed to each count of the complaint, is equivalent to a separate plea to each, is erroneous unless all the pleas are subject to the

demurrer. *Shebor v. Barbour*, — Ala. —..... 1:120

A plea insufficient in substance may be disposed of by demurrer. A plea defective in form may be reached by proper motion under the statute. *Southern Turpentine Co. v. Douglass*, 61 Fla. 424.....1:788

3. Striking Out of Plea on Motion.

To authorize the striking out of a plea on motion, it must not only be informal and bad, but it must be wholly irrelevant. *Southern Turpentine Co. v. Douglass*, 61 Fla. 424....1:788

POISONS.

Injury to servant by poison, see Master and Servant, 20, 22.

POLICE POWER.

See Workmen's Compensation, 10.

PRINCIPAL AND AGENT.

See Master and Servant; Parent and Child.

Liability of owner of automobile for negligence of borrower, see Automobiles, 3.

Authority of agent to employ physician, see Master and Servant, 44.

1. Proof of Agency.

Agency cannot be established by proof of the words and acts of the alleged agent. *Hill v. Day et al*, — Me. —..... 1:313

2. Declarations of Agent; *Res gestae*; Scope of Agency.

The declaration of a physician practicing osteopathy, employed by a corporation conducting a school of osteopathy to treat a student previously treated by another osteopathic physician as agent of the corporation, to the effect that ailments of the student were caused by the treatment of the latter physician, are inadmissible in an action for malpractice brought against the corporation and such physician, because not a part of the *res gestae* and not within the scope of the agency.

Atkinson v. American School of Osteopathy, — Mo. —.....1:275

PROCESS.

Appearance of party on return day and consent to adjournment as waiver of objection that summons returnable in less than prescribed time, see Justice of the Peace, 1.

PROXIMATE CAUSE.

Liability for injury proximately resulting from negligence in furnishing public accommodations, see Amusements, 2.

Connection between absence of automobile license and injury, see Automobiles, 2.

Placing corner stone to protect post as proximate cause of injury to driver, see Highways, 3.

1. Modification of Rule in Georgia.

The ruling in *Wallace v. Cannon*, 38 Ga. 199, 14 Am. Neg. Cas. 120, 121, 95 Am. Dec. 385 (1868), *Martin v. Wallace*, 40 Ga. 52, and *Redd v. Muscogee R. Co.*, 48 Ga. 102, to the effect that when two or more parties engage in an act violative of a penal law, and one of them is injured by the carelessness or negligence of the other, the injured party is not entitled to damages, should be so qualified as to provide that, to defeat a recovery in such case, the violation of the statute must be a contributing cause of the injury. *Hughes v. Atlanta Steel Co.*, 136 Ga. 429 1:429

RAILROADS.

See Carriers; Employer's Liability Acts; Miniature Railroad; Street Railway.

1. Injuries or Death at Crossings.—Care Required.

It is the duty of one driving along a highway which crosses a railroad track to look and listen before driving upon the track and to exercise ordinary care to make the act of looking and listening effective. *Southern Ry. Co. v. Valentine*, — Va. —.....1:500

One who drives upon a railroad track at night at a familiar crossing from which an approaching train is visible for a distance of 100 yards, is guilty of such contributory negligence as will bar a recovery of damages for his death. *Southern Ry. Co. v. Valentine*, — Va. —.....1:500

2. — Sufficiency of Evidence; Presumption.

In an action brought to recover damages for the alleged negligent death of plaintiff's decedent, the jury is justified, after considering the balance of probabilities and drawing inferences from the circumstances proved, in finding in favor of the plaintiff on evidence which shows that the deceased left his place of employment about 5:30 P. M., on the 29th day of December, and that about an hour later his body was found some 250 yards east of the point where the road crosses the railroad tracks which he was in the habit of taking instead of walking along the tracks with other workmen; that no witness saw the accident; that two trains running on parallel tracks passed each other a little distance east of the crossing, on one of which the bell was ringing, but on the east bound train the bell was not ringing; and that the train running without giving any warning could not be seen by one approaching the tracks until close to the crossing. *Grand Trunk Ry. Co. of Canada v. Griffith et al.*, 45 Can. Sup. Ct. Rep. 380.....1:503

3. Duty as to Trespassers.

A railroad company owes no legal duty to a trespasser to cover a small drainage ditch running across its track in its yard. *Spizale v. Louisiana Ry. & Navigation Co.*, 128 La. 187..1:326

The only duties which a railroad company owes to a boy trespassing upon the tracks in its yards, where cars are being switched, is to keep a reasonable lookout in moving its locomotive and not to run upon him after having seen him. *Spizale v. Louisiana Ry. & Navigation Co.*, 128 La. 187. 1:326

..... 1:326

4. Warnings in Railroad Yards.

Where it was not customary for a railroad company to ring the bell or sound the whistle while switching cars in its yard, except when passing street crossings, it was not actionable negligence for failure to do so on a particular occasion toward one who was familiar with the movements of trains in the yard. *Spizale v. Louisiana Ry. & Navigation Co.*, 128 La. 187..1:326

RELIEF.

See Constitutional Law.

RES IPSA LOQUITUR.

See Evidence, 2.

RESORTS.

See Agricultural Associations; Amusements; Bathing.

SCHOOLS AND COLLEGES.

Injury to boy while playing in school yard at recess, see Infants, 4.

1. Liability for Malpractice.

A corporation owning a medical school at which students are entitled to treatment as a part of the consideration for their payments, is jointly liable for malpractice with the president of the faculty who negligently treated a student as the agent of the corporation. *Atkinson v. American School of Osteopathy*, — Mo. —..1:275

SHIPPING.

Collision between bridge and boat, see Collisions, 1.

STATUTES.

See Constitutional Law; Employer's Liability Acts; Explosions, 1; Workmen's Compensation.

Connection between absence of auto-

mobile license and injury, see Automobiles, 2.

Statutory duty of master to guard machinery, see Master and Servant, 12-14.

Servant's assumption of master's violation of statute, see Master and Servant, 35.

Statute relieving plaintiff from burden of showing want of contributory negligence as retroactive, see Master and Servant, 40.

Violation of statute as affecting servant's right to recover for injury, see Master and Servant, 43.

Requiring destruction of noxious weeds, see Vegetation, 1.

1. Construction; "Rights of Another."

The expression "rights of another" in the maxim set forth in section 6661 of the Revised Codes of 1905 means legal rights, and is not broad enough to include all rights determined by our moral and ethical standards. *Langer v. Goode*, 21 N. D. 462.....1:772

2. Validity; Conjecture.

A statute cannot be set aside upon mere conjecture or speculation that an unlawful result will follow. *State ex rek Yaple v. Creamer*, — Ohio St. — 1:30

3. Implied Repeal.

The Act of Feb. 23, 1903, known as 24 Stat. at Large, p. 79, which provides that the acceptance of benefits by an injured employee of a railroad company which maintains a relief department, shall not bar a recovery by such employee of damages for an injury sustained, is not impliedly repealed by the Act of March 7th, 1905, known as 24 Stat. at Large, p. 962, which contains the same language as the former statute, with a slight variation, but which extends the application of the statute so as to include "any corporation, firm, or individual operating a relief department" for the benefit

of employees, and which contains a provision expressly repealing all inconsistent acts. *Miller v. Atlantic Coast Line R. Co. et al.*, — S. C. — 1:447

STORES.

1. Injury to Customer.—General Liability of Proprietor.

The liability of an owner for the condition of his premises, to one there by his invitation, extends no further than the invitation. *Cohrth v. Great Atlantic & Pacific Tea Co.*, 36 App. D. C. 569..... 1:330

2. — Inspection of Premises.

The question of what shall suffice to constitute the reasonable period of time within which the failure of the store-keeper to make proper inspection of his floors and stairways in order to discover and remedy dangerous defects in them before he is chargeable with responsibility for accidents of the present nature is one which in cases where the facts are undisputed, and different inferences cannot reasonably be drawn from the same facts, is for the court, and not for the jury, to determine. *Schnatterer v. Bamberger et al.*, 81 N. J. Law, 558.....1:669

3. — Proprietor as Insurer.

The defendant was not an insurer against accidents, and its duty to the plaintiff was satisfied when it had used reasonable care to maintain its store passages in a condition safe for her proper use. *Schnatterer v. Bamberger et al.*, 81 N. J. Law, 558.....1:669

4. — Fall Through Trapdoor.

A proprietor of a store who, by notice, expressly withdraws, for a certain day each week, his implied invitation to customers to visit a part of the building where prizes are kept and exchanged for tickets, is not liable, although he assigns no definite reason for

his action, to one who disregards such notice and is injured by falling through an open trapdoor located in that part of the store. *Coberth v. Great Atlantic & Pacific Tea Co.*, 36 App. D. C. 569. 1:330

A request by a clerk in a store, that a customer refrain from going into a certain part of the store where premiums are displayed, is as effective as a command, to withdraw an implied invitation theretofore existing to visit such part, and, therefore, a customer cannot recover damages for injuries sustained by falling through a trapdoor left open in that part of the store. *Coberth v. Great Atlantic & Pacific Tea Co.*, 36 App. D. C. 569. 1:330

5. — Fall on Stairs.

The defendant kept a department store, in which was a stairway connecting the first floor with the basement, for the use of its customers. The plaintiff testified that in treading on one of the steps in going down the stairway the heel of her shoe caught in a brass nosing (originally attached to the edge of the wooden step to prevent its wear), which was loose, but was not then noticed by her, causing her to trip and fall downstairs, and it was held that, when the plaintiff rested her case, the evidence failed to show the storekeeper had been guilty of any want of reasonable care in keeping the stairway safe for her use, for the reason it had not appeared that the defect which she had said caused her to trip and fall had (a), in fact, been brought to the notice of the storekeeper before the accident; or (b) had existed for such a length of time as to charge the storekeeper with notice thereof. In the absence of proof of one of these conditions, a *prima facie* case that defendant had been guilty of negligence was not established. *Schnatterer v. Bamberger et al.*, 81 N. J. Law, 558. 1:609

STREET RAILWAYS.

Carriage of passengers for hire, see Carriers.

1. Duty of One Crossing Tracks.

A person who crosses the tracks of an electric railroad company must exercise ordinary care for his own safety, in order to exonerate himself from the charge of contributory negligence. *Peck v. Rhode Island Co.*, 32 R. I. 449. 1:806

2. Injury to Driver Upon Tracks.

One who chooses to drive upon the tracks of an electric railroad company simply for his own convenience, and not because of any condition of the road or the use of the same by vehicles thereon which requires him to leave the ordinary traveled part, acquires no right of way superior to that of the railway company, and he must constantly keep in mind that he is in a place of danger, and be prepared to exercise diligence to prevent collision with cars. *Peck v. Rhode Island Co.*, 32 R. I. 449. 1:806

A person who had in the daytime traveled over a road in which the tracks of an electric railway company were located, and in the night time drove along the car tracks in such road without looking for approaching cars, is guilty of negligence as matter of law, precluding a recovery by him for injuries resulting from a head-on collision. *Peck v. Rhode Island Co.*, 32 R. I. 449. 1:806

SUBROGATION.

See Insurance, 4.

SUNDAY.

Violation of statute as affecting servant's right to recover for injury, see Master and Servant, 43.

TAX.

See License; Workmen's Compensation.

TELEGRAPHS AND TELEPHONES.

1. Electric Shock While Using Telephone.

In an action against a telephone company to recover damages for personal injuries caused by an electric shock received while attempting to use a public telephone, the trial court should instruct the jury to find for the defendant, where it appears by plaintiff's testimony that he was shocked while attempting to use the telephone during a violent thunderstorm, and the uncontradicted proof shows that the best known device in general use for protecting persons against injury by abnormal or atmospherical electricity, had been placed on the telephone in question. *Rocap v. Bell Teleph. Co.*, 230 Pa. 597..... 1:675

A telephone company is not guilty of negligence in failing to place a notice on a public telephone warning against the use of the instrument during electrical storms, in absence of proof that such warnings have been adopted by other telephone companies. *Rocap v. Bell Teleph. Co.*, 230 Pa. 597. 1:675

2. Wires Sagging Over Highway.—Inspection.

A telephone company must be reasonably vigilant in the inspection of its line, especially of portions which cross highways, to discover whether any of the wires sag so as to render the highway dangerous for travel. *Herlitzke v. La Crosse Interurban Teleph. Co.*, 145 Wis. 185.....1:422

3.—Injuries to Vehicle.

In an action against a telephone company to recover damages for injuries to one caused by the top of her buggy being caught by a telephone wire hanging loosely across the highway, an instruction to the jury that before they could find the defendant guilty of negligence, they must be

satisfied to a reasonable certainty from a preponderance of the evidence that the sagging of the pole line resulted from a defective condition thereof, which in the exercise of ordinary care the defendant should have remedied, and that the burden of proof was upon the plaintiff, correctly states the law. *Herlitzke v. La Crosse Interurban Teleph. Co.*, 145 Wis. 185.....1:422

In an action against a telephone company to recover damages for injuries sustained by one, the top of whose buggy was caught by a telephone wire hanging loosely across the highway, evidence held sufficient to warrant a finding of negligence on the part of the defendant. *Herlitzke v. La Crosse Interurban Teleph. Co.*, 145 Wis. 185. 1:422

TELEPHONES.

See Telegraphs and Telephones.

TORTS.

Liability of infant for, see Infants, 4.

Liability of parent for tort of child, see Parent and Child, 1.

TRESPASS.

Duty of railroad company to trespassers, see Railroads, 3.

1. Injury to Trespasser; Malice.

That a defendant might reasonably have anticipated a possible injury to a trespasser plays no part in determining wilfulness. There must be some evidence tending to show the maliciousness of the offender,—that is, his intention to do an injury,—else the jury are without authority to infer it. *Hoberg v. Collins, Lavery & Co.*, 80 N. J. Law, 425..... 1:792

As against a trespasser a malicious or intentional injury is actionable, while a merely negligent act will not form the basis of recovery, because the duty to observe reasonable care is not owing to the trespasser. *Hoberg v. Collins, Lavery & Co.*, 80 N. J. Law, 425..... 1:792

2. Duty Toward Infant.

The rule that denies to a trespasser upon a moving wagon a duty on the part of the driver to observe care toward him, is not changed by the fact that he is an infant. *Hoberg v. Collins, Lavery & Co.*, 80 N. J. Law, 425. 1:792

TRIAL.

See appeal, 3-5.

Effect of failure to give instruction, see Appeal, 7.

Right of party to take advantage of error of court in misquoting testimony when he failed to call attention to error, see Appeal, 8.

When instruction presumed to be erroneous, see Appeal, 9.

Refusal of misleading instructions, see Automobiles, 9.

Instructions in actions for injury to servant, see Master and Servant, 47.

1. Submission of Case When Evidence Contradictory.

It is the province of the jury to determine the facts in a case in which the testimony is peculiarly contradictory. *Norfolk & Atlantic Terminal Co. v. Rotolo*, 195 Fed. 231. 1:72

Where, from the facts shown by the evidence, reasonable men might draw different conclusions respecting the question of negligence, it must be submitted to the court or jury trying the cause. *Williams v. Norvell Shapleigh Hardware Co.*, — Okla. —, 116 Pac. 786. 1:321

A verdict should be directed for the defendant in an action based upon negligence, where, on the admitted facts, fair-minded men would agree that the plaintiff failed to exercise ordinary care under the circumstances. *Hendrickson v. Swenson*, — S. D. —. 1:590

2. Instructions.

An instruction which deals only with matters relating to the quantum of

damages is not erroneous because it assumes right of recovery, provided another instruction has been given properly instructing the jury in regard to the essential facts constituting such right of recovery. In such case it is proper to consider the two instructions together. *Jenkins v. Montgomery*, 69 W. Va. 795. 1:58

It is error to give a general affirmative charge for a defendant where there is proof on plaintiff's part of the existence of the essential fact in issue. *Rodgers v. Harper & Moore*, 170 Ala. 647. 1:78

A statement by the trial judge in his charge, that he recalls no evidence as to a certain fact, although not commendable, is not prejudicial where he told the jury that they were free to consider the evidence for themselves. *Coberth v. Great Atlantic & Pacific Tea Co.*, 36 App. D. C. 569. 1:330

Ordinarily an erroneous instruction is not cured by giving subsequent correct instructions, which are necessarily inconsistent therewith, since it is impossible to tell which instructions the jury followed. *Acme Cement Plaster Co. v. Westman*, — Wyo. —, 122 Pac. 89. 1:408

Error cannot be predicated upon the mere refusal of the trial court to give requested instructions which correctly state the law, if the same matter is embodied in substance in the general charge already given. *Herlitzke v. La Crosse Interurban Telephone Co.*, 145 Wis. 185. 1:422

3. Special Interrogatories; Framing.

In asking for the submission to the jury of special interrogatories, it is the duty of counsel to frame each question so as to present only a single, direct, and material fact, one which is within the issues of the case. *Hashman v. Wyandotte Gas Co.*, 83 Kan. 328, 111 Pac. 468. 1:816

4. Striking Plea.

Where facts averred in a special plea may as a matter of right be shown under other pleas in the case, harm may not result from striking the special plea. *Southern Turpentine Co. v. Douglass*, 61 Fla. 424.....1:788

Where a plea has been erroneously stricken out, a reversal of the judgment may follow, unless it clearly appears that no harm has resulted therefrom to the party complaining of it. *Southern Turpentine Co. v. Douglass*, 61 Fla. 424..... 1:788

5. Setting Aside Verdict.

The verdict in a negligence action will not be set aside because of the insufficiency of the evidence to sustain some of the charges of negligence, if the verdict is sustained as to any one charge. *Brown et al. v. Thorne*, 61 Wash. 18, 111 Pac. 1047.....1:107

6. Remission of Damages; Condition As to New Trial.

A trial court has the power, where excessive damages have been allowed, and the motion to set aside the verdict is based on that ground, to make a remission a condition precedent to overruling the motion, even where the damages are unliquidated. *Gila Valley Globe & Northern Ry. Co. v. Hall*, 13 Ariz. 270, 112 Pac. 845.....1:362

The trial court may require a remittitur of excessive damages as a condition of refusing a new trial, where the excessive verdict is due to the liberality of jurors rather than to prejudice or passion. *Gila Valley Globe & Northern Ry. Co. v. Hall*, 13 Ariz. 270, 112 Pac. 845.....1:362

7. Variance Between Pleading and Proof; Objection; Raising on Appeal.

Under the provisions of section 4225, Rev. Codes, no variance between the allegations and the proof is deemed to be material, unless it has actually mis-

led the adverse party to his prejudice; and whenever there is such variance it is the duty of the adverse party to make seasonable objection on that ground, and if objection is not made it cannot be raised for the first time, either on motion for a new trial or on appeal. *Johnson v. Gary et al.*, 18 Idaho, 623, 111 Pac. 855.....1:800

8. Videlicet.

A party need not prove the precise circumstances averred after a *videlicet*. *Blanchard v. Vermont Shade Roller Co.*, 84 Vt. 442.....1:152

VEGETATION.

1. Destruction of Noxious Weeds; Statute.

Section 2086 of the Revised Codes of 1905 construed, and *held* that no such duty devolves upon any person to destroy such noxious weeds as wild mustard upon the land he owns or occupies as will make him liable in damages for failure to destroy until after the county commissioners have prescribed the time and manner of destruction. As to whether an action would lie after the commissioners have acted, not determined. *Langer v. Goode*, 21 N. D. 462.....1:772

VERDICT.

Conclusiveness on appeal, see Appeal, 2.

General verdict as consistent with special verdict in action to recover damages caused by negligent operation of automobile, see Automobiles, 5.

Setting aside verdict, see Trial, 5.

WAIVER.

Waiver of limitation of carrier's liability, see Carriers, 12.

Appearance of party on return day and consent to adjournment as waiver of objection that summons returnable in less than prescribed time, see Justice of the Peace, 1.

Waiver of right to benefit of Work-

men's Compensation Act, see Workmen's Compensation, 12.

WARRANTY.

As to condition of leased premises, see Landlord and Tenant, 3.

WATERS.

Injury to patron at bathing resort, see Amusements 6.

Liability of municipal corporation for damage by water, see Municipal Corporations, 10-12.

1. Contaminated Supply; Liability of City.

A complaint charged that defendant city negligently allowed the supply of its waterworks system to become polluted with poisonous substances, and large quantities of filth and sewage to escape into and saturate its water supply, by reason whereof plaintiffs' intestates contracted typhoid fever and died as a consequence. On demurrer it is held:

(1) The municipality was liable for its negligence in its private or corporate capacity, and was not exempt because it was carrying out a governmental function.

(2) Under section 4503, Rev. Laws 1905, an administrator of a person whose death was due to the wrongful act of a municipality may maintain an action against it for damages consequent thereon. *Maylone v. City of St. Paul*, 40 Minn. 406, 42 N. W. 48, and *Orth v. Village of Belgrade*, 87 Minn. 237, 12 Am. Neg. Rep. 294, 91 N. W. 843, followed. *Keever v. City of Mankato*; *Flanagan v. City of Mankato*, 113 Minn. 55.....1:187

2. Shutting Off Supply; Gas Heater; Fire.

A water company which, without notice to the consumer, shuts off for the space of thirty minutes, the supply of water from the main in front of a consumer's premises for the purpose of repairing a defective hydrant, as

required by its contract with the city, is not liable for injuries to the house of the consumer by fire set by an instantaneous gas waterheater, caused by a cutting off of the water supply, where the company had no notice that such a heater had been installed in this particular house, although it was known that such heaters were in general use throughout the city, as the loss was not the proximate cause of the company's failure to give notice of its intention to shut off the supply. *Brame v. Light, Heat & Water Co. of Jackson*, 95 Miss. 26.....1:297

3. Surface Water; Injuries; Saturation.

Where damage is caused by surface water negligently collected in a ditch or trench dug through a public alley, and thence allowed to soak through a sewer connection previously constructed into a basement of an adjacent building, the fact that the owner or occupant of the building in making his sewer connection failed to tamp the earth replaced therein sufficiently to render it impervious to water does not constitute contributory negligence. *Helphand v. Independent Teleph. Co. of Omaha et al.*, 88 Neb. 542....1:615

WEAPONS.

Explosion of gun used by servant to protect sheep, see Master and Servant, 17.

WEEDS.

See Vegetation.

WITNESSES.

See Evidence.

1. Competency; Proof of Earnings of Another.

A witness who did not prepare the pay rolls of an employer, and who has no knowledge of a certain employee's earnings aside from that gained from the pay rolls, is incompetent to testify, by referring to such pay rolls, as to

the earnings of such employee in an action brought to recover damages for personal injuries sustained by the latter. *Acme Cement Plaster Co. v. Westman*, — Wyo. —, 122 Pac. 89....1:408

WORKMEN'S COMPENSATION.

See Constitutional Law; Master and Servant; Statutes.

1. Operation and Effect.

Contracts in existence and unexpired at the time a Workmen's Compensation Act is put into operation by an employer cannot be affected or impaired by it. *State ex rel. Yapple v. Creamer*, — Ohio St. —.....1:30

The Workingmen's Compensation Bill, by express terms, does not apply to injuries sustained by an employee before the bill took effect, and, therefore, a right of action for a personal injury which accrued under existing laws constitutes a vested right which is not affected by section 1 of part I of said bill, which provides that, in an action for an injury to or death of an employee, it shall be no defense that he was negligent, or that the injury was caused by the negligence of a fellow employee. *Opinion of Justices*, 209 Mass. 607.....1:557

A Workingmen's Compensation Bill which does not require liability insurance companies to insure risks under such bill, is not unconstitutional because it requires that such companies and policy holders, if policies are issued under such bill, shall be governed by the bill so far as applicable. *Opinion of Justices*, 209 Mass. 607.....1:557

2. Appeal to Courts.

The constitutional right to appeal to the courts for redress of wrongs is not denied by a Workmen's Compensation Act which establishes a board of awards by which the right of claimants to participate in a State insurance fund is determined, where an appeal lies to the courts from its decision,

and an injured employee may, in the first instance, waive his claim under the Act and sue in court for his damages. *State ex rel. Yapple v. Creamer*, — Ohio St. —.....1:30

3. Validity.—In General.

It is within the power of the Legislature to provide new measures or means for the recovery of compensation by servants who sustain injuries in the performance of the duties of their employment. *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271.....1:517

The Miners' Compensation Act which provides for indemnity to be paid to injured employees engaged in mining coal in the State, from a fund collected by assessment levied on both the employer and employee, is not unconstitutional on the ground that it fails to differentiate between a careful and careless employer. *Cunningham v. North Western Improvement Co.*, — Mont. —, 119 Pac. 554.....1:720

4. — Delegation of Judicial Power.

The board of awards created by the Workmen's Compensation Act is not a court and the Act is not invalid as delegating judicial power to it in contravention of the Constitution. *State ex rel. Yapple v. Creamer*, — Ohio St. —.....1:30

The Miners' Compensation Act (*Laws* 1909, Chap. 67), which provides indemnity for employees injured in mining coal within the State, from a fund to be collected from an assessment levied on both employer and employee based on the amount of coal mined and the amount of wages earned, and providing a summary method for the disposition of claims filed under the Act, is not unconstitutional, as conferring judicial power upon ministerial officers. *Cunningham v. North Western Improvement Co.*, — Mont. —, 119 Pac. 554.....1:720

5. — Abolition of Defenses.

A bill (Workingmen's Compensation

Bill, Part I, § 1) which provides that, in an action brought to recover damages for personal injuries to or death of an employee, it shall be no defense that he was negligent, or that the injury was caused by the negligence of a fellow employee, or that the risk was assumed, when construed as meaning contributory negligence or negligence of a fellow servant which falls short of serious and wilful misconduct, is constitutional. Opinion of Justices, 209 Mass. 607.....1:557

The rules relating to contributory negligence and assumption of risk, and the effect of the negligence of a fellow servant, having been established by the courts and not by the Constitution, it is within the power of the Legislature to change or repeal such rules as defenses, as in its wisdom it deems best for the welfare of the commonwealth. Opinion of Justices, 209 Mass. 607. 1:557

6. — Equal Protection of Law.

The classification for purposes of taxation or of regulation under a police measure, of workmen engaged in the erection or demolition of bridges or buildings of iron or steel construction, or in the operation of elevators used in connection with the erection or demolition of such bridges or buildings, or in work on scaffolds of any kind elevated 20 feet or more, or about wires charged with electric currents, or with explosives, or in the operation of railroads, or in the construction of tunnels and subways, or in work carried on under compressed air, is not a denial of the equal protection of the laws, on the ground that the classification is arbitrary. *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271.....1:517

7. — Two Actions for Same Injury.

The Miners' Compensation Act (Laws 1909, Chap. 67), which provides a scheme of accident insurance and disability benefits for employees engaged

in mining coal within the State, to be paid from a fund collected from mine operators in accordance with the amount of coal mined and from employees in accordance with the amount of wages earned, is unconstitutional in that it fails to protect the employer who furnishes compensation under the Act, from being sued for the injury in an action at law, and thus compelled to pay twice. *Cunningham v. North Western Improvement Co.*, — Mont. —, 119 Pac. 554.....1:720

8. — Due Process of Law.

That a Workmen's Compensation Act abolished the defense of assumption of risk does not render it repugnant to State and Federal Constitutions as taking private property without due process of law. *State ex rel. Yapple v. Creamer*, — Ohio St. —.....1:30

An Act (Workmen's Compensation Act) which attempts to make a master liable for an injury sustained by a servant as a necessary risk incident to his employment, or one inherent in the nature thereof, without any fault on the part of the master, unless such injury is due to the wilful misconduct of other servants, is void as a taking of liberty and property without due process of law. *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271.....1:517

A Workingmen's Compensation Bill, which is not compulsory in character as applied to employers and employees, does not violate any provision of the Federal or State Constitutions concerning the taking of property without due process of law. Opinion of Justices, 209 Mass. 607.....1:557

Workingmen's Compensation Bill, part I, § 1, which provides that in an action for injury to or death of an employee, it shall be no defense that he was negligent, or that he assumed the risk, or that the injury was caused by the negligence of a fellow employee, is not invalid as authorizing the taking

of property without due process of law. Opinion of Justices, 209 Mass. 607.1:557

The Miners' Compensation Act (Laws 1909, Chap. 67), which provides a scheme of accident insurance and benefits for persons engaged in mining coal within the State, and which requires the funds to be provided by payment of one per cent. of the wages of such persons and a tax on the employers of one cent per ton for each ton of coal mined, is in the nature of an occupation or license tax, and therefore the plan provided for its collection is not invalid as taking property without due process of law. *Cunningham v. North Western Improvement Co.*, — Mont. —, 119 Pac. 554.....1:720

9. — Class Legislation.

A Workmen's Compensation Act affecting only employers of five or more employees and applicable only to workmen or operatives, is not invalid on the ground that it makes an unjust and arbitrary classification. *State ex rel. Yapple v. Creamer*, — Ohio St. —..... 1:30

Workingmen's Compensation Bill, Part I, § 2, providing that § 1 of such bill which declares that in an action for injury to or death of an employee, it shall be no defense that the employee was negligent, or that the injury was caused by the negligence of a fellow employee, or that he assumed the risk of injury, shall not apply to domestic servants and farm laborers, is not unconstitutional. Opinion of Justices, 209 Mass. 607.....1:557

The Miners' Compensation Act (Laws 1909, Chap. 67), which creates a State insurance fund for the benefit of workmen disabled while engaged in mining coal within the State, is not unconstitutional as class legislation as singling out a particularly hazardous occupation and subjecting it to burdens not placed on other employments equally hazard-

ous, where the statute is equally applicable to workmen within the State engaged in the particularly hazardous business of mining coal. *Cunningham v. North Western Improvement Co.*, — Mont. —, 119 Pac. 554...1:720

10. — Police Power or Regulation.

An Act (102 Ohio L. 524) providing a plan of compensation from a State insurance fund, for accidental injuries sustained by those employed in industrial pursuits pertains to the public welfare and is a valid exercise of the police power. *State ex rel. Yapple v. Creamer*, — Ohio St. —.....1:30

The Miners' Compensation Act (Laws 1909, Chap. 67), which provides for an indemnity to be paid to employees injured in the course of their employment in the mining of coal within the State, is not invalid as a police regulation, on the ground that it provides for the payment to an injured employee of his compensation in a lump sum. *Cunningham v. North Western Improvement Co.*, — Mont. —, 119 Pac 554. 1:720

The Miners' Compensation Act (Laws 1909, Chap. 67), providing for State industrial insurance and compensation for injuries sustained by employees engaged in mining coal within the State, is constitutional, as a valid exercise of the police power. *Cunningham v. North Western Improvement Co.*, — Mont. —, 119 Pac. 554.....1:720

11. — Jury Trial.

Miners' Compensation Act (Laws 1909, Chap. 67), which provides a scheme for industrial insurance for the benefit of persons engaged in mining coal within the State and those dependent upon them, in case of injury or death in the course of their employment, is not unconstitutional as violating the section of the Constitution providing that the right of trial by jury shall remain inviolate. *Cunning-*

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12. — Waiver of Right to Benefit of Act.

The section of a Workingmen's Compensation Bill which provides that no agreement by an employee waiving his right to compensation under such bill shall be valid, is constitutional. Opinion of Justices, 209 Mass. 607. 1:557

13. Right to Compensation.

The employment of a journeyman baker to drive a cart for the purpose of delivering loaves of bread and receive payment therefor from his master's customers, does not expose the servant to any peculiar danger from cold, beyond that to which a large section of the population whose occu-

pation is out of doors is ordinarily exposed, so as to entitle him to claim compensation under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58) for injury to his hand caused by frostbite. Warner v. Couchman, 1 K. B., 351 (1911), App. Cas. 35 (1912)1:51

Evidence that a licensed driver operated a public taxicab, without control by the company owning the machine and that he received one-fourth of the proceeds for his services, justifies a finding that he was a bailee of the cab rather than a servant, and, therefore, he was not entitled to an award under the Workmen's Compensation Act for an injury sustained by him while driving the cab. Smith v. General Motor Cab Co., Ltd., App. Cas. 188 (1911)1:576

